TEXAS REGISTER

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School children's artwork is used to decorate the front cover and blank filler pages of the *Texas Register*. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but important facet of state government.

The artwork featured on the front cover is chosen at random. Inside each issue, the artwork is published on what would otherwise be blank pages in the *Texas Register*. These blank pages are caused by the production process used to print the *Texas Register*.

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IN THIS ISSUE

EMERGENCY RULES

Emergency Rules include new rules, amendments to existing rules, and the repeals of existing rules. A state agency may adopt an emergency rule without prior notice or hearing if the agency finds that an imminent peril to the public health, safety, or welfare, or a requirement of state or federal law, requires adoption of a rule on fewer than 30 days' notice. An emergency rule may be effective for not longer than 120 days and may be renewed once for not longer than 60 days (Government Code, §2001.034). An emergency rule may be effective for not longer than 120 days and may be renewed once for not longer than 60 days. (Government Code, §2001.034).

TITLE 13. CULTURAL RESOURCES

PART 3. TEXAS COMMISSION ON THE ARTS

CHAPTER 35 A GUIDE TO OPERATIONS, PROGRAMS AND SERVICES

13 TAC §35.1, §35.2

The Texas Commission on the Arts is renewing the effectiveness of the emergency adoption for the repeal of §35.1 and §35.2, for a 20-day period. The repeals were originally published in the November 17, 2006, issue of the *Texas Register* (31 TexReg 9434).

Filed with the Office of the Secretary of State on December 21, 2006.

TRD-200606877
Ricardo Hernandez
Executive Director
Texas Commission on the Arts
Original Effective Date: November 6, 2006
Expiration Date: January 10, 2007
For further information, please call: (512) 936-6564

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13 TAC §35.1, §35.2

The Texas Commission on the Arts is renewing the effectiveness of the emergency adoption of new §35.1 and §35.2, for a 20-day period. The text of the new sections were originally published in the November 17, 2006, issue of the *Texas Register* (31 TexReg 9434).

Filed with the Office of the Secretary of State on December 21, 2006.

TRD-200606878
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PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

Symbols in proposed rule text. Proposed new language is indicated by underlined text. [~~Square brackets and strikethrough~~] indicate existing rule text that is proposed for deletion. "(No change)" indicates that existing rule text at this level will not be amended.

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 353. MEDICAID MANAGED CARE

SUBCHAPTER A. GENERAL PROVISIONS

1 TAC §353.5

The Texas Health and Human Services Commission (HHSC) proposes §353.5, concerning Internet Posting of Sanctions Imposed For Contractual Violations. The rule outlines the authority of HHSC to impose sanctions when it is determined that a Medicaid Managed Care Organization (MCO) has failed to comply with the terms of its contract with HHSC. The rule also explains when and how HHSC will post MCO sanction information on its Internet website.

Background and Justification

The proposed new rule is required by S.B. 1188, Section 6, 79th Legislature, Regular Session, 2005, Internet Posting of Sanctions Imposed for Contractual Violations. This rule requires that HHSC prepare and maintain a record of each enforcement action initiated by HHSC that results in a sanction, including a penalty, imposed against an MCO.

Section-by-Section Summary

Section 353.5 describes HHSC's authority to determine when an MCO has failed to comply with the terms of a contract to provide health care services to clients. The proposed new rule also states that HHSC will be responsible for identifying and investigating contract deficiencies and violations, and taking corrective action to remedy contract deficiencies and violations of an MCO. HHSC will give written notice to the MCO that describes the contract violation. In addition, MCO sanctions that are not under administrative appeal or judicial review will be posted to the HHSC website.

Fiscal Note

Thomas M. Suehs, Deputy Executive Commissioner for Financial Services, has determined that during the first five-year period the rule is in effect there will be no fiscal impact to state government. The proposed rule will not result in any fiscal implications for local health and human services agencies. Local governments will not incur additional costs.

Small and Micro-business Impact Analysis

Mr. Suehs has also determined that there will be no effect on small businesses or micro businesses to comply with the rule as it will not be required to alter their business practices as a result of the rule. There are no anticipated economic costs to persons who are required to comply with the proposed rule. There is no anticipated negative impact on local employment.

Public Benefit

Chris Traylor, Associate Commissioner for Medicaid and CHIP, has determined that for each year of the first five years the proposed new rule is in effect, the public will benefit from the adoption of the rule. The anticipated public benefit of enforcing the proposed rule will be improved access to and quality of health care services.

Regulatory Analysis

HHSC has determined that this proposal is not a "major environmental rule" as defined by §2001.0225 of the Texas Government Code. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

Takings Impact Assessment

HHSC has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under §2007.043 of the Government Code.

Public Comment

Written comments on the proposed rule may be submitted to Gilbert Estrada, Policy Analyst in the Medicaid/CHIP Division, Texas Health and Human Services Commission, P.O. Box 85200, MC-H600; Austin, Texas 78708-5200; by fax to (512) 491-1953, or by e-mail to gilbert.estrada@hhsc.state.tx.us within 30 days of publication of this proposal in the *Texas Register*.

Public Hearing

A public hearing is scheduled for January 24, 2007 from 1:30 p.m. to 2:30 p.m. in the HHSC Lone Star Conference Room at 11209 Metric Boulevard, Austin, Texas. Persons requiring further information, special assistance, or accommodations should contact Meisha Spencer at (512) 491-1453.

Statutory Authority

The new rule is proposed under the Texas Government Code, §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; the Human Resources Code, §32.021 and the Texas Government Code, §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas.

The proposed new rule affects the Human Resources Code, Chapter 32, and the Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by this proposal.

§353.5. Internet Posting of Sanctions Imposed For Contractual Violations.

(a) This section pertains to a Managed Care Organization (MCO) which the Health and Human Services Commission (HHSC) determines has failed to comply with the terms of a contract to provide health care services to clients through a managed care plan issued by the MCO.

(b) HHSC is responsible for identifying and investigating contract deficiencies and violations, and taking corrective action to remedy contract deficiencies and violations of an MCO. Corrective actions may include assessment of liquidated damages, contract termination, and/or any other sanction or remedy available under the terms and conditions of the contract or state and federal law and regulations.

(c) If HHSC finds that performance issues, problems, or deficiencies exist with an MCO, as those issues pertain or relate to certain deliverable services, HHSC may investigate a claim of contract violation and determine whether a contract violation has occurred or currently exists.

(d) If HHSC determines that a contract violation has occurred or currently exists, HHSC will decide on the appropriate contract sanction or remedy to be imposed.

(e) If required by contract, HHSC will give written notice to the MCO, describing the contract violation, the contract sanction or remedy to be imposed, the method by which reimbursement (if applicable) to HHSC will be made, and the time frame for resolution of the issue.

(f) When a contract violation has been determined and a sanction imposed, HHSC will post the following information on HHSC's Internet website:

(1) The name and address of the MCO;

(2) A description of the contractual obligation the MCO failed to meet;

(3) The date of determination of noncompliance;

(4) The date the sanction was imposed;

(5) The maximum sanction that may be imposed under the contract for the violation; and

(6) The actual sanction imposed against the MCO.

(g) HHSC shall post and maintain the records required by this section on HHSC's Internet website in English and Spanish. HHSC shall update the list of records on the website at least quarterly.

(h) The information posted on the website will be displayed for twelve months (12) from the date of posting, or for twelve months after completion of the contract remedy, whichever is later.

(i) HHSC will not post information on HHSC's Internet website that relates to a sanction while the sanction is the subject of an administrative appeal or judicial review. Nothing in this subsection creates or enlarges a right to an administrative appeal or judicial review of a contract sanction or remedy.

(j) For purposes of this section, a sanction includes assessment or imposition of one or more of the following contract remedies:

(1) assessment of a penalty;

(2) assessment of liquidated damages;

(3) assessment of consequential damages;

(4) imposition of a corrective action plan;

(5) debarment;

(6) involuntary suspension of a contract or portion of a contract; and/or

(7) involuntary termination of a contract or portion of a contract.

(k) For purposes of this section, a sanction is not considered to include:

(1) a vendor hold or similar temporary delay in payment; or

(2) an agreed temporary remedial measure intended to facilitate contract compliance.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 21, 2006.

TRD-200606865
Steve Aragón
General Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: February 4, 2007
For further information, please call: (512) 424-6576

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CHAPTER 354. MEDICAID HEALTH SERVICES

SUBCHAPTER A. PURCHASED HEALTH SERVICES

DIVISION 11. GENERAL ADMINISTRATION

1 TAC §354.1186

The Texas Health and Human Services Commission (HHSC) proposes new §354.1186, Requirements for the Health Passport. This rule defines the "Health Passport" and describes the minimum requirements of the health passport as required by Senate Bill (S.B.) 6, 79th Legislature, Regular Session, 2005, codified at §266.006, Family Code, relating to the health passport.

Background and Justification

S.B. 6 requires that HHSC, in coordination with the Department of Family & Protective Services (DFPS), develop a comprehensive healthcare services delivery model for Texas children in substitute (foster) care. The model will include a "Health Passport" for children in DFPS conservatorship. The Health Passport is an electronic medical record that will contain portions of the child's medical information and can be used to document medical services provided to the child. The Health Passport is intended to ensure continuity of healthcare for children in DFPS conservatorship. S.B. 6 requires that HHSC develop rules specifying the information to be included in the Health Passport.

Section-by-Section Summary

Section 354.1186, Requirements for the Health Passport, identifies information that must be included in the Health Passport, including identifying information on the child and the child's providers, identification of the child's known health problems, a record of provider visits and immunizations, and information on prescriptions. The proposed new rule requires that the Health Passport system must be secure and must comply with the security and privacy requirements of the Health Insurance Portability and Accountability Act of 1996 (HIPAA). The proposed new rule also establishes to whom the information on the Health Passport will be available when the child is discharged from foster care.

Fiscal Note

Thomas M. Suehs, Deputy Commissioner for Financial Services, has determined that for the first five years the proposed new rule is in effect there will be a cost to the state. For state fiscal year 2007, the state will incur a cost of $500,000, a federal cost of $500,000 and total cost of $1,000,000. For fiscal years 2008 - 2011, the cost to maintain the Health Passport is estimated to be $250,000 state funds and $250,000 federal funds annually, for a total cost of $500,000 per year, or $3,000,000 total for the time period. Local governments will not incur additional costs. The proposed amendment will not have an affect on the local health and human service agencies.

Small and Micro-business Impact Analysis

Mr. Suehs has also determined that there will be no effect on small businesses or micro-businesses to comply with the new rule, as they will not be required to alter their business practices as a result of the rule. There are no anticipated economic costs to persons who are required to comply with the proposed rule. There is no anticipated negative impact on a local economy.

Public Benefit

Chris Traylor, Associate Commissioner for Medicaid and CHIP, has determined that for the period the proposed new rule is in effect, the public will benefit from the adoption of the rule. The anticipated public benefit of enforcing the proposed new rule will be improved access to and quality of health care services for children in foster care.

Regulatory Analysis

HHSC has determined that this proposal is not a "major environmental rule" as defined by §2001.0225 of the Texas Government Code. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

Takings Impact Assessment

HHSC has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under §2007.043 of the Government Code.

Public Comment

Written comments on the proposed amendment to the rule may be submitted to Deborah Norris, Policy Analyst in the Medicaid/CHIP Division, Texas Health and Human Services Commission, P.O. Box 85200, MC-H600; Austin, Texas 78708-5200; by fax to (512) 491-1953; or by e-mail to deborah.norris@hhsc.state.tx.us within 30 days of publication of this proposal in the *Texas Register*.

Public Hearing

A public hearing is scheduled for January 24, 2007 from 9:30 a.m. to 10:30 a.m. in the HHSC Lone Star Conference Room at 11209 Metric Boulevard, Austin, Texas. Persons requiring further information, special assistance, or accommodations should contact Meisha Spencer at (512) 491-1453.

Statutory Authority

The new rule is proposed under the Texas Government Code, §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; the Human Resources Code, §32.021, and the Texas Government Code, §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and the Texas Family Code, §266.006, which requires the Executive Commissioner to adopt rules implementing the health passport program.

The new rule affects the Human Resources Code, Chapter 32; the Texas Government Code, Chapter 531; and the Texas Family Code, §266.003 and §266.006. No other statutes, articles, or codes are affected by this proposal.

§354.1186. Requirements for the Health Passport.

(a) The Health Passport is an electronic medical record used to document healthcare services provided to clients who receive services through the comprehensive foster care healthcare delivery system, mandated by the Texas Family Code, § 266.003 and §266.006, and other Medicaid clients as may be designated by the Health and Human Services Commission (HHSC).

(b) The contents of the Health Passport must include, but are not limited to:

(1) Client's name, birthdate, address of record, and Medicaid ID number;

(2) Name and address of each of the client's physicians and health care providers;

(3) A record of each visit to a physician or other healthcare provider, including routine checkups conducted in accordance with the Texas Health Steps program;

(4) A record of immunizations;

(5) Identification of the client's known health problems; and

(6) Information on all client prescriptions.

(c) The electronic Health Passport system must be secure and maintain the confidentiality of the client's health records in compliance with security and privacy rules adopted by the U.S. Department of Health and Human Services under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 45 C.F.R. §§164.302 - 164.318 and §§164.500 - 164.534.

(d) If the client is in foster care, the Health Passport information shall be available in printed and electronic formats to the following individuals when the client is discharged from foster care:

(1) The client's legal guardian, managing conservator, or parent; or

(2) The client, if the client is at least 18 years of age or has been awarded the legal rights of an adult through the removal of the

disabilities of minority, as defined in the Texas Family Code, Title 2, Chapter 31.

(e) The administrator of the electronic Health Passport system shall be determined by HHSC. The administrator shall be responsible for meeting all requirements of the Health Passport.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 21, 2006.

TRD-200606866
Steve Aragón
General Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: February 4, 2007
For further information, please call: (512) 424-6576

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SUBCHAPTER M. WOMEN'S HEALTH PROGRAM

1 TAC §§354.2510, 354.2512 - 354.2518

The Texas Health and Human Services Commission (HHSC) proposes to add a new Subchapter M, Women's Health Program, to its Medicaid Health Services chapter, §§354.2510 and 354.2512 - 354.2518.

Background and Justification

Section 32.0248 of the Human Resource Code, added by Acts 2005 by the 79th Texas Legislature during its regular session, and Rider 71 of the Appropriations Act, authorizes the Texas Health and Human Services Commission (HHSC) to implement a program to expand access to preventative health and family planning services through the medical assistance program for women between the ages of eighteen and forty-four. To implement this program, HHSC proposes to amend its Medicaid Health Services chapter by adding Subchapter M to Title 1, Chapter 354 of the Texas Administrative Code to create the Women's Health Program. The proposed rules set out the guidelines for determining and certifying eligibility and procedures related to the application process.

Section-by-Section Summary

Section 354.2510, Definitions, provides definitions of terms used in new Subchapter M. The requirements for applying and providing information are set out in §354.2513 Financial Eligibility requirements related to countable income and deductions are contained in §354.2514. The non-financial eligibility requirements related to citizenship, immigration status, age, residence, social security number, Third Party Resource, and identity are found in §354.2515. Medicaid eligibility effective dates are discussed in §354.2516. Section 354.2517 sets out the only change that must be reported by the participant. Finally, §354.2518 contains the information regarding the applicants right to appeal a determination.

Fiscal Note

Tom Suehs, Deputy Commissioner for Financial Services, has determined that during the first five-year period the proposed rule is in effect there will be a savings to the state of $268.1 million. Local Governments operating health facilities could experience additional flexibility in Family Planning funding sources provided by the Department of State Health Services, as a portion of their patients begin receiving Women Health Plan services. Local government operated public hospitals could experience a short-term change in the number of deliveries as clients receive these Family Planning Services. Long-term changes are not significant to these hospitals.

Small and Micro-business Impact Analysis

Mr. Suehs has also determined that there will be no effect on small businesses or micro businesses to comply with the proposal as they will not be required to alter their business practices as a result of the rule. There are no anticipated economic costs to persons who are required to comply with the proposed rule. There is no anticipated negative impact on local employment.

Public Benefit

Linda Franco, Associate Commissioner for Family Services, has determined that for each year of the first five years the proposed rules are in effect, the public will benefit from the adoption of the section. The anticipated public benefit, as a result of enforcing the section, will be the expansion of medical assistance to a population of women who are not currently eligible to receive benefits due to income limits, age, and household composition policies of other programs. It is anticipated that the expansion of services will also reduce the number of unintended pregnancies among low-income women unable to afford counseling, contraception, and health care services.

Regulatory Analysis

HHSC has determined that this proposal is not a "major environmental rule" as defined by §2001.0225 of the Texas Government Code. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

Takings Impact Assessment

HHSC has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under §2007.043 of the Government Code.

Public Comment

Written comments on the proposal may be submitted to Regina Perez at P.O. Box 12668, Austin, Texas 78711-2668, by fax to (512) 206-5061, or by e-mail to gina.perez@hhsc.state.tx.us within 30 days of publication of this proposal in the *Texas Register*.

Statutory Authority

The new rules are proposed under the Texas Government Code §531.033, which provides the Commissioner of HHSC with broad rulemaking authority; the Human Resources Code §32.021 and the Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas and by §23.0248 of the Texas Human Resources Code which directs HHSC to establish this Women's Health Program.

The proposed new rules affect the Human Resources Code, Chapter 32, and the Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by this proposal.

§354.2510. Definitions.

The words and terms used in this subchapter have the following meanings, unless the context clearly indicates otherwise. The definitions apply to the Women's Health Program (WHP).

(1) Adjunctive Eligibility--Term used when a person's financial eligibility for the program is deemed because her inclusion in a group where at least one of the members receives services under another program such as food stamps or Medicaid.

(2) Budget Group--Members of a household whose needs, income, resources, and medical expenses are considered in determining eligibility for medical assistance programs. The budget group may include both members who are eligible for the medical assistance program and those who are not.

(3) CMA--Children's Medical Assistance

(4) FPIL--Federal Poverty Income Limit

(5) HHSC--Health and Human Services Commission

(6) TANF--Temporary Assistance for Needy Families

(7) WHP--Women's Health Program

(8) WIC--Woman, Infant and Children supplemental nutrition program

(9) File Date--the date the application is received by HHSC.

§354.2512. Participation Requirements.

To receive benefits under the Women's Health Program, an applicant must be

(1) a female, age of 18 through 44

(2) not otherwise receiving benefits under Medicaid, CHIP, or Medicare services, and

(3) have countable income, as provided in §354.2514 of this subchapter relating to Financial Eligibility Requirements of this section, less than or equal to the 185% of the Federal Poverty Income Limit (FPIL).

§354.2513. Application Procedures.

An applicant may apply by submitting a one-page Women's Health Program application. The application will not be used to apply for any other programs.

(1) The Texas Health and Human Services Commission (HHSC) processes Women's Health Program applications using the application rules of the Temporary Assistance for Needy Families Program, as detailed in Chapter 372 of this title (relating to Texas Works), except as follows:

(A) HHSC also processes applications and renewals received via mail or fax;

(B) HHSC does not require a face-to-face or telephone interview at an initial or renewal application. The applicant may request an interview;

(C) HHSC may conduct a face-to-face interview with an applicant if HHSC has received conflicting information related to the household membership and income that affects eligibility and the information cannot be verified through other means;

(D) HHSC may conduct a face-to-face interview for renewals of Women's Health Program eligibility when there is no associated case record for TANF, food stamps or Medicaid coverage, and HHSC has received conflicting information related to household membership or income that affects eligibility and the information cannot be verified through other means;

(E) HHSC allows any office of a state Health and Human Services agency to accept an initial or renewal application; and

(F) HHSC contracts with third parties to accept applications from hospital districts (including state-owned teaching hospitals), federally qualified health centers, and county health departments.

(2) There are no conditions limiting the designation of an authorized representative.

§354.2514. Financial Eligibility Requirements.

An applicant for the Women's Health Program must meet the income eligibility rules under the Temporary Assistance for Needy Families Program, as detailed in Chapter 372 of this title (relating to Texas Works - Eligibility), except as follows:

(1) HHSC will verify an applicant's countable income by obtaining documents such as the following:

(A) copies of one or more paycheck stubs issued within 60-days prior to the file date;

(B) a copy of the most recent federal income tax return;

(C) a copy of the most recent Social Security Award Letter;

(D) copies of one or more child support check within 60-days prior to the file date; or

(E) written confirmation from an employer of the employee's income.

(2) HHSC will verify an applicant's income deductions by obtaining documents such as the following:

(A) a copy of a paycheck stub showing garnishment of wages for a child support deduction if the paycheck clearly indicates the deduction is for child support; or

(B) Office of the Attorney General (OAG) data or other documents HHSC considers reliable.

(3) HHSC will count TANF payments as income.

(4) HHSC will use the standard TANF work-related expense deductions and dependent care deductions, but not the other TANF earned income deductions.

(5) Increased income does not cause the denial of a participant's ongoing eligibility for the Women's Health Program.

(6) Applicants are considered adjunctively eligible at an initial or renewal application, and therefore, financially eligible, if:

(A) a member in her budget group receives WIC benefits,

(B) she is a member of a certified food stamp household, or

(C) she is in a Medicaid budget group for someone receiving Medicaid.

§354.2515. Non-Financial Eligibility Requirements.

To be eligible for the Women's Health Program (WHP), an applicant must meet the following eligibility criteria, in addition to the criteria

detailed in §354.2514 of this title (relating to Financial Eligibility Requirements):

(1) Citizenship. Applicants must be U.S. citizens, as required by Children's Medical Assistance rules in Chapter 354 of this title.

(2) Legal Permanent Residents. Applicants must be aliens with approved Bureau of Citizenship and Immigration Services status, as required by the Temporary Assistance for Needy Families (TANF) rules found in Chapter 372, Subchapter B, Division 3 of this title (relating to Citizenship). However, certain eligible aliens who were admitted to the United States on or after August 22, 1996, are eligible for Medicaid for a seven-year period following entry to the country as specified in 8 United States Code §1612(b)(2)(A)(i), instead of the five-year period of eligibility for TANF.

(3) Resources. Resources are not requested or verified for the Women's Health Program.

(4) Age. Applicants must be at least age 18 and less than 45 years old to receive benefits. The applicant is considered 18 years of age the month of her 18th birthday and 44 years old through the month of her 45th birthday. Women are ineligible for WHP if an application is received the month prior to her 18th birthday or the month after she turns 45 years of age.

(5) Residence. The applicant must be a Texas resident.

(6) Social Security Number (SSN). Applicants must provide or apply for an SSN as required by Medically Needy program rules detailed in Chapter 354, Subchapter E of this title (relating to SSN) except that HHSC requests, but does not require, budget group members who are not eligible for Medicaid to provide or apply for an SSN.

(7) Third-party resources. Applicants and recipients must comply with third-party resources requirements, as detailed in the Human Resources Code, §32.033.

(8) Identity. Applicants must verify their identity at initial certification.

§354.2516. Medicaid Eligibility Effective Dates.

The Texas Health and Human Services Commission (HHSC) determines eligibility dates for the Women's Program Health program applicants as follows:

(1) The application must be processed by the 45th day from the file date.

(2) Program coverage begins on the 1st day of the application month on which the applicant met all eligibility criteria.

(A) An applicant is ineligible due to age if she submits an application the month before her 18th birthday or the month after her 45th birthday.

(B) Eligibility cannot be determined on a date earlier than the date the Women's Health Program was implemented.

(3) Applicants whose applications and renewals are certified receive a 12-month continuous period of eligibility.

(4) The Women's Health Program does not provide for retroactive Medicaid coverage under the WHP program. A person receiving WHP may apply for and receive 3-months prior Medicaid under another Medicaid program before or during their WHP eligibility period.

(5) The applicant's certification will end prior to the end of their 12-month continuous eligibility if the following occurs:

(A) the death of the recipient,

(B) applicant moves out-of-state, or

(C) she voluntarily withdrawals.

§354.2517. Requirement to Report Changes.

Women's Health Program recipients are only required to report moving out of the state.

§354.2518. Right to Appeal.

(a) Women's Health Program applicants and recipients have the right to appeal eligibility decisions made by the Health and Human Services Commission. Appeals are governed by HHSC fair hearing rules contained in Chapter 357 of this title (relating to Medical Fair Hearings).

(b) HHSC provides an action notice regarding an HHSC decision to Medicaid applicants and recipients. The action notice includes information about how to file an appeal and the availability of free legal representation.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 21, 2006.

TRD-200606867
Steve Aragón
General Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: February 4, 2007
For further information, please call: (512) 424-6576

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CHAPTER 358. MEDICAID ELIGIBILITY
SUBCHAPTER G. APPLICATION FOR MEDICAID

1 TAC §358.610

Pursuant to the federal Deficit Reduction Act of 2005 (DRA), PL 109-362, the Texas Health and Human Services Commission (HHSC) proposes to amend §358.610 relating to Medicaid Coverage. Specifically the amendment is to subsection (c). The purpose of this amendment is to incorporate the mandatory provision under §1902(a)(10)(A)(i)(II) of the Social Security Act (SSA) as amended by the Deficit Reduction Act of 2005, Section 6065 of Public Law 109-171.

Background and Justification

On February 8, 2006, the DRA was signed into law. The DRA made changes to certain Medicaid eligibility provisions of the SSA, necessitating the change to the Texas rules. HHSC proposes to amend its Medicaid Eligibility chapter by amending a rule in Title 1, Subchapter G to, Chapter 358 of the TAC.

Rule Change Summary

Currently in Texas, Medicaid eligibility for Supplemental Security Income (SSI) recipients is effective the month of application or the first month of eligibility. Where retroactive eligibility is applicable, such eligibility is counted backwards for up to three months from the first month of SSI payment. SSI payment begins the month after application for SSI or the first month after eligibility criteria are met to receive SSI. The first month of Medicaid eligibility in Texas is referred to as the "gap" month. States

have not been required to begin Medicaid eligibility for the "gap" month.

Section 6065 of P.L. 109-171 eliminates the "gap" month by amending section 1902(a)(10)(A)(i)(II) of the SSA to deem individuals under 21 found eligible for and receiving SSI payment to be receiving SSI without regard to the delay imposed under section 1611(c)(7) of the SSA. Therefore, an SSI recipient under age 21 becomes Medicaid eligible in the month before the first month of SSI payment, rather than the month of SSI payment. Effective February 8, 2007, SSI recipients must be eligible for Medicaid beginning with the "gap" month. When computing retroactive Medicaid eligibility, SSI recipients under 21 will have retroactive Medicaid eligibility counted backwards for up to three months from the "gap" month rather than the first month of SSI payment.

In all other respects, retroactive Medicaid eligibility will be computed in accordance with the policy the State employs for all other SSI recipients.

This provision is effective for all SSI applications filed on behalf of children on or after February 8, 2007. However, the full effect of section 6065 will not be realized until all months of potential Medicaid eligibility, including any retroactive months under section 1902(a)(34), is after February 8, 2007. Until that time, rules in effect before enactment of the Deficit Reduction Act of 2005 for computing retroactive Medicaid eligibility will continue to be applicable for Medicaid recipients under age 21 who also receive SSI.

Fiscal Note

Tom Suehs, Deputy Executive Commissioner for Financial Services, has determined that during the first 5-year period the proposed amendments are in effect, there will only be a fiscal impact for one-time automation changes. One additional month of client service medical cost has no significant fiscal impact. Estimated additional costs will only be for the first fiscal year (2007) and are estimated to be $167,688 from both the state and federal funds for a total of $335,376. The proposed amendments will not result in any fiscal implications for local health and human services agencies. Local governments will not incur additional costs.

Small and Micro-business Impact Analysis

Mr. Suehs has also determined that there will be no effect on small businesses or micro businesses to comply with the proposed amendments, as they will not be required to alter their business practices as a result of the amendments. There are no anticipated economic costs to persons who are required to comply with the proposed amendments. There is no anticipated negative impact on local employment.

Public Benefit

Anne Heiligenstein, Deputy Executive Commissioner for Social Services, has determined that for each of the first five years the proposed amendments are in effect, the public will benefit from the adoption of the rules. The anticipated public benefit of enforcing the proposed amendments is a potential increased month of coverage for those SSI recipients, who are less than 21 years of age, applying for retroactive Medicaid.

Regulatory Analysis

HHSC has determined that this proposal is not a "major environmental rule" as defined by §2001.0225 of the Texas Government Code. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of a state or a sector of the state. These proposed amendments are not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

Takings Impact Assessment

HHSC has determined that these proposed amendments do not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under §2007.043 of the Government Code.

Public Comment

Written comments on the proposed amendments may be submitted to Dee Church at Mail Code 2090, P.O. Box 12668, Austin, TX 78711-2668, by fax to (512) 206-5211, or by e-mail to dee.church@hhsc.state.tx.us within 30 days of publication of this proposal in the *Texas Register*.

Statutory Authority

The amendment is proposed under the Texas Government Code, §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; the Human Resources Code, §32.021 and the Texas Government Code, §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas.

The proposed amendments affects the Human Resources Code, Chapter 32, and the Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by this proposal.

§358.610. Medicaid Coverage.

(a) (No change.)

(b) An individual may qualify for prior eligibility only, for current eligibility only, or for future eligibility or for a combination of the three. Coverage may be regular, institutional, or a combination of the three. For processing and accounting purposes, eligibility is further divided into three types:

(1) - (3) (No change.)

(c) Retroactive coverage.

(1) For certified Supplemental Security Income (SSI) clients age 21 or older, Medicaid coverage automatically begins with the month prior to the first month of SSI payment and is also available for the two preceding months if the individual meets all Medicaid eligibility requirements for those two months.

(2) For certified Supplemental Security Income (SSI) clients who are under age 21, Medicaid coverage automatically begins with the month prior to the first month of SSI payment and is also available for the three preceding months if the individual meets all Medicaid eligibility requirements for those three months.

(3) For other clients, the three months considered in determining eligibility are those months immediately before the month in which the individual filed a denied application for SSI, filed a formal application for MAO, transferred from a limited Medicaid program such as QMB, or the three months before the month an application is received from a decedent's agent. The department considers as potentially eligible for retroactive Medicaid coverage the following individuals:

(A) [~~(1)~~] those who have applied for SSI cash benefits,

(B) [~~(2)~~] those who apply for Medical Assistance Only, and

(C) [~~(3)~~] deceased persons whose application is being filed by a bona fide agent. In this situation, the time period for which three-months-prior coverage applies is the three months before the receipt of the application.

(d) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 21, 2006.

TRD-200606868
Steve Aragón
General Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: February 4, 2007
For further information, please call: (512) 424-6576

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TITLE 7. BANKING AND SECURITIES

PART 7. STATE SECURITIES BOARD

CHAPTER 101. GENERAL ADMINISTRATION

7 TAC §101.5

The Texas State Securities Board proposes an amendment to §101.5, concerning charges for copies of public records. The proposal would amend the rule to reflect the relocation of state copy charges rules from the Texas Building and Procurement Commission to the Office of the Attorney General. The duties and administrative rulemaking authority under the public information law, Chapter 552, Texas Government Code, were transferred to the Office of the Attorney General through enactment of Senate Bill 452 and Senate Bill 727, 79th Legislature, 2005. The action of the Office of the Attorney General formally adopting the copy charges rules was published in the September 29, 2006, issue of the *Texas Register* (31 TexReg 8251).

Carla James, Director, Staff Services Division, and David Weaver, General Counsel, have determined that, for the first five-year period the rule is in effect, there will be no foreseeable fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. James and Mr. Weaver also have determined that, for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be that the location of the state copy charges rules will be accurately referenced. There will be no effect on micro or small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed. There is no anticipated impact on local employment.

Comments on the proposal to be considered by the Board should be submitted in writing within 30 days after publication of the proposed section in the *Texas Register*. Comments should be sent to David Weaver, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167, or sent by facsimile to (512) 305-8310.

Statutory authority: Texas Civil Statutes, Article 581-28-1. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes.

Cross-reference to Statute: Texas Government Code, §552.262.

Statutes and codes affected: none.

§101.5. Charges for Copies of Public Records.

(a) The cost to any person requesting copies of any public record of the State Securities Board pursuant to the open records provisions of the Texas Government Code, Title 5, Chapter 552, will be the applicable charge established by the Office of the Attorney General in Title 1, Part 3, Chapter 70, [~~Texas Building and Procurement Commission in Title 1, Part 5, Chapter 111, Subchapter C,~~] of the Texas Administrative Code, which is reflected in Form 133.2.

(b) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 18, 2006.

TRD-200606798
Denise Voigt Crawford
Securities Commissioner
State Securities Board
Earliest possible date of adoption: February 4, 2007
For further information, please call: (512) 305-8303

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TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 60. COMPLIANCE MONITORING RULES

10 TAC §§60.2 - 60.4, 60.6 - 60.13, 60.17, 60.18

The Department of Housing and Community Affairs (the Department) proposes amendments to §§60.2 - 60.4, 60.6 - 60.13, 60.17, and 60.18, concerning monitoring of compliance. Definitions required by other changes are added to §60.2. The Department has determined new procedures regarding monitoring of Housing Tax Credit developments after the extended use period are needed and are added in §60.7. Provisions of 10 TAC §§1.11, 1.13, and 1.14, which are proposed for repeal, have been incorporated into the compliance rules. Requirements for physical inspection reporting are clarified in §60.12. Clarification of Utility Allowances is incorporated in §60.17. Minor changes have been made to correct grammar, update formatting, and add clarifying language.

Michael Gerber, Executive Director, has determined that for the first five-year period the amendments as proposed will be in effect there will be no fiscal implications for state or local government as a result of administering or enforcing the amendments.

Mr. Gerber has also determined that for each year of the first five years the amendments as proposed will be in effect the public benefit anticipated as a result of the amendments will be more logically organized and readily available rules for developers, management organizations, and tenants. There is no additional anticipated cost to persons who are required to comply with the amendments as proposed. There will be no adverse economic effect on small or micro businesses.

Comments on the proposed amendments may be submitted in writing to Mike Garrett, Compliance Monitor, Texas Department of Housing and Community Development, P.O. Box 13941, Austin, Texas 78711-3941, or by e-mail to michael.garrett@td-hca.state.tx.us. To be considered, a written comment must be received on or before the 31st day after the date the proposed amendments are published in the *Texas Register.*

Public hearings were held across the state between September 21 and October 18, 2006 to receive input on the proposed amended rules. Changes have been made in response to comments received from the public and from the Department's Board.

At the conclusion of the 31st day after the proposed amendments are published in the *Texas Register,* no further written comments will be considered or accepted by the commission.

The amendments are proposed under Texas Government Code, Chapter 2306.

No other code, article, or statute is affected by the proposed amendments.

§60.2. Definitions.

The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Affordability Period--the affordability period commences as specified in the Land Use Restriction Agreement (LURA) [~~LURA~~], or federal regulation or commences on the first day of the compliance period as defined by §42(i)(1) of the Internal Revenue Code (IRC) and continues through the appropriate program's affordability requirements or termination of the LURA, whichever is later. The term of the affordability period shall be imposed by LURA or other deed restriction and may be terminated upon foreclosure. During this period the Department shall monitor to ensure compliance with programmatic rules, regulations, and application representations.

(2) Application--an application, in the form prescribed by the Department, filed with the Department by an Applicant, including any exhibits or other supporting material. (§2306.6702)

(3) [~~(2)~~] Board--the governing board of the Texas Department of Housing and Community Affairs.

(4) Code--the U.S. Internal Revenue Code of 1986, as amended from time-to-time, together with any applicable regulations, rules, rulings, revenue procedures, information statements or other official pronouncements issued by the United States Department of the Treasury or the Internal Revenue Service.

(5) [~~(3)~~] Department--the Texas Department of Housing and Community Affairs, an official and public agency of the State of Texas pursuant to Chapter 2306, Texas Government Code.

(6) [~~(4)~~] Development--a property or work or a project, building, structure, facility, or undertaking, whether existing, new construction, remodeling, improvement, or rehabilitation, that meets or is designed to meet minimum property standards required by the Department and that is financed under the provisions of Chapter 2306, Texas Government Code.[~~, for the primary purpose of providing sanitary, decent, and safe dwelling accommodations for rent, lease, use, or purchase by individuals and families of low and very low income and families of moderate income in need of housing. The term includes:~~]

[~~(A) buildings, structures, land, equipment, facilities, or other real or personal properties that are necessary, convenient, or desirable appurtenances, including streets, water, sewers, utilities, parks, site preparation, landscaping, stores, offices, and other non-housing facilities, such as administrative, community, and recreational facilities the Department determines to be necessary, convenient, or desirable appurtenances;~~]

[~~(B) single and multifamily dwellings in rural, urban/exurban areas; and~~]

[~~(C) a proposed qualified low income housing project, as defined by §42(g), of the IRC 1986 (26 U.S.C. §42(g)), that consists of one or more buildings containing multiple units, that is financed under a common plan, and that is owned by the same person(s) for federal tax purposes, including a project consisting of multiple buildings that are located on scattered sites and contain only rent-restricted units.~~]

(7) Housing sponsor--

(A) an individual, including an individual or family of low and very low income or family of moderate income, joint venture, partnership, limited partnership, trust, firm, corporation, or cooperative that is approved by the department as qualified to own, construct, acquire, rehabilitate, operate, manage, or maintain a housing Development, subject to the regulatory powers of the department and other laws; or

(B) in an economically depressed or blighted area, or in a federally assisted new community located within a home-rule municipality, the term may include an individual or family whose income exceeds the moderate income level if at least 90% of the total mortgage amount available under a mortgage revenue bond issue is designed for individuals and families of low income or families of moderate income.

(8) HTC Development--A Development using Housing Tax Credits allocated by the Department.

(9) [~~(5)~~] Low Income Unit--a unit that is intended for occupancy by an income eligible household, as defined by the Department or the Code.

(10) [~~(6)~~] Land Use Restriction Agreement (LURA)--an agreement between the Department and the Development Owner which is a binding covenant upon the Development Owner's successors in interest, that encumbers the Development with respect to the requirements of this chapter, Chapter 2306, Texas Government Code; the Code [~~§42 of the IRC~~]; and the requirements of the various programs administered or funded by the Department.

(11) [~~(7)~~] Material Noncompliance--

(A) a Housing Tax Credit Development [~~HTC development~~] located within the state of Texas will be classified by the Department as being in material noncompliance status if the noncompliance score for such Development [~~development~~] is equal to or exceeds a threshold of 30 points in accordance with the material noncompliance provisions, methodology, and point system of this title [~~or, if the HTC development is located outside the state of Texas, and noncompliance is reported to the Department that would be equal to or exceed a noncompliance threshold score of 30 points if measured in accordance with the methodology and point system set forth in this subsection~~].

(B) Non HTC Developments monitored by the Department with 1 to 50 low income units will be classified as being in ma-

terial noncompliance status if the noncompliance score is equal to or exceeds a threshold of 30 points. Non HTC Developments monitored by the Department with 51 to 200 low income units will be classified as being in material noncompliance status if the noncompliance score is equal to or exceeds a threshold of 120 points. Non HTC Developments monitored by the Department with 201 or more low income units will be classified as being in material noncompliance status if the noncompliance score is equal to or exceeds a threshold of 150 points.

(C) For all programs, a Development will be in material noncompliance if the noncompliance is stated in §60.18 of this chapter to be material noncompliance. Each Development will be scored for each program for which funding was allocated by the Department.

(12) Non HTC--any Development not utilizing Housing Tax Credits.

(13) [~~(8)~~] Unit--any residential rental unit in a Development [~~development~~] consisting of an accommodation, including a single room used as an accommodation on a non-transient basis, that contains complete physical facilities and fixtures for living, sleeping, eating, cooking, and sanitation.

§60.3. Development Inspections.

The Department[~~, through PMC,~~] shall conduct or may contract for inspections during the construction and rehabilitation process and at final construction completion to monitor for compliance with all program requirements, including construction threshold criteria and application Development characteristics associated with any Development funded or administered by the Department. Development inspections will be conducted by the Department or by an independent third party inspector acceptable to the Department and will include a construction quality evaluation. (§2306.081, Texas Government Code)

(1) Inspection procedures for HTC Developments include:

(A) A review of the evidence of commencement of substantial construction. The minimum activity necessary to meet the requirement of substantial construction for new Developments will be defined as having expended 10% of the construction contract amount for the Development, adjusted for any change orders, and as documented by both the most recent Application and Certification for Payment (or equivalent) and the inspecting architect. The minimum activity necessary to meet the requirement of substantial construction for rehabilitation Developments will be defined as having expended 10% of the construction budget as documented by the inspecting architect. Evidence of such activity shall be provided in a format prescribed by the Department.

(B) An initial Development [~~interim development~~] inspection to be conducted between 45 to 90 days after the earlier of the submittal or the due date of commencement of substantial construction. [~~within two years of the award.~~]

(C) A final Development inspection performed at construction completion. Evidence of construction completion must be submitted within thirty days of completion and shall be provided in a format prescribed by the Department.

(2) Development inspection procedures for non-HTC multifamily Developments include:

(A) An initial Development [~~development~~] inspection to be conducted between 45 to 90 days from issuance of notice to proceed. [~~within two years from award.~~]

(B) A final Development inspection performed at construction completion. Evidence of completion must be submitted within thirty days of completion and shall be provided in a format prescribed by the Department. The inspection is required by the Department in order to release retainage.

(3) The Department may require a copy of all reports from all construction inspections performed on behalf of the Applicant as needed. Those reports must indicate that the Department may rely on the information provided in the reports and the inspector is properly credentialed.

(4) Additional inspections may be conducted by the Department or by an independent third party Inspector acceptable to the Department during the construction process, if necessary, based on the level of risk associated with the Development, as determined by the Department. The Department [~~Real Estate Analysis Division or PMC. PMC~~] identifies HTC Developments to be at high risk if inspections identify issues with construction threshold criteria, [~~and~~] Development characteristics identified at applicationor past performance problems. The Department [~~PMC~~] identifies non-HTC Developments to be at high risk if inspections conducted during the construction process identify issues with program requirements or Development characteristics identified at application.

(5) Applicable Laws. An applicant may not receive funds or other assistance from the Department until the Department receives a properly completed certification from the applicant that the housing development is, or will be upon completion of construction, in compliance with the following housing laws:

(A) state and federal fair housing laws, including Chapter 301, Property Code, the Texas Fair Housing Act, Title VIII of the Civil Rights Act of 1968 (42 U.S.C. §3601, et seq.), and the Fair Housing Amendments of 1988 (42 U.S.C. §3601, et seq.);

(B) the Civil Rights Act of 1964 (42 U.S.C. §2000a, et seq.);

(C) the Americans with Disabilities Act of 1990 (42 U.S.C. 12101, et seq.); and

(D) Section 504, Rehabilitation Act of 1973 (29 U.S.C. §701, et seq.). (§2306.257)

[~~(5) Developments having financing from the United States Department of Agriculture Rural Development (TX-USDA-RHS) will be exempt from these inspections, provided that the Development Owner provides to the Department copies of all inspections made by TX-USDA-RHS throughout the construction of the Development.~~]

§60.4. Monitoring During the Affordability Period.

(a) The Department will monitor for compliance with representations made by the Development Owner in the Application and in the LURA, whether required by the applicable program rules, regulations, including HOME Final Rule, the Code [~~§42 of the IRC, §142(d) of the IRC, Treasury Regulations or other rulings of the IRS~~], the U. S. Department of Housing and Urban Development (HUD) Community Planning and Development (CPD) Notices, the Texas Government Code §2306.001 et. seq., or [~~and~~] Chapters 51 and 53 of this title.

(b) The Department periodically monitors Developments for compliance with the fair housing requirements specified in §60.3(5) of this chapter. Monitoring may occur during construction or during the affordability period.

(1) The monitoring level for each housing Development is based on the amount of risk of noncompliance with the requirements specified in §60.3(5) of this chapter associated with the Development.

(2) The Department shall notify the recipient in writing of an apparent violation of fair housing laws and shall afford the recipient a reasonable amount of time, as determined by the Department, to cor-

rect the identified violation, if possible, prior to the imposition of any sanction.

(3) The Department shall notify the Texas Workforce Commission, Civil Rights Division as required in the Texas Government Code §2306.257(d), with a copy to the Development owner in the event:

(A) no response to the Department's notice of apparent violation is received during the response period;

(B) the owner concurs with the Department's assessment and indicates they are unable or unwilling to correct the violation(s); or

(C) the owner and the Department are unable to agree if the identified issue is a violation.

(4) If fair housing violations are identified prior to the issuance of forms 8609 (For HTC Developments) or release of final retainage, no forms 8609 will be issued or retainage will not be released until the violations are corrected to the Department's satisfaction.

(c) Sanctions. The Department may impose one or more of the following sanctions depending on the severity of the violation of a law specified in §60.3(5) of this chapter, and as further described in subsections (a) and (b) of this section, by a recipient of housing tax credits, housing funds or other assistance from the Department:

(1) termination of assistance,

(2) deobligation of funds, if available, and

(3) a bar on future eligibility for assistance through a housing program administered by the Department. A bar shall be in place for at least one calendar year from the date of imposition by the Department and may not last for more than three calendar years from the date of correction.

§60.6. Section 8 Voucher Holders and Tenant Selection.

(a) The Department will monitor to ensure Development [~~development~~] owners comply with [~~§1.14 of this title regarding residents receiving rental assistance under Section 8, United States Housing Act of 1937 (42 U.S.C. §1437F).~~(] §2306.269 and §2306.6728, Texas Government Code[~~)~~] regarding residents receiving rental assistance under Section 8, United States Housing Act of 1937 (42 U.S.C. §1437F).

(b) Applicability. The policies, standards, and sanctions established by this section apply only to:

(1) multifamily housing Developments that receive the following assistance from the Department on or after January 1, 2002: (§2306.185)

(A) a loan or grant in an amount greater than 33% of the market value of the Development on the date the recipient took legal possession of the Development; or

(B) a loan guarantee for a loan in an amount greater than 33% of the market value of the Development on the date the recipient took legal title to the Development;

(2) multifamily rental housing Developments that applied for and were awarded housing tax credits after 1992.

(3) housing Developments that benefit from the incentive program under §2306.805 of the Texas Government Code.

(c) Housing sponsors of multifamily rental housing Developments described in subsection (b) of this section are prohibited from:

(1) excluding an individual or family from admission to the Development because the individual or family participates in the housing choice voucher program under Section 8, United States Housing Act of 1937 (42 U.S.C. §1437f); and

(2) using a financial or minimum income standard for an individual or family participating in the voucher program that requires the individual or family to have a monthly income of more than 2.5 times the individual's or family's share of the total monthly rent payable to the owner of the Development. A household participating in the voucher program or receiving any other type of rental assistance may not be required to have a minimum income exceeding $2,500 per year.

(d) To demonstrate compliance with this section housing sponsors shall:

(1) State in their leasing criteria that Section 8 voucher or certificate holders are welcome to apply and will be provided the same consideration for occupancy as any other prospective tenant;

(2) State in their leasing criteria that the Development will comply with state and federal fair housing and antidiscrimination laws;

(3) Apply all other screening criteria, including employment policies or procedures and other leasing criteria (such as rental history, credit history, criminal history, etc.) uniformly and in a manner consistent with the Texas and Federal Fair Housing Acts, program guidelines, and the Department's rules;

(4) Approve and distribute an Affirmative Marketing Plan. The Affirmative Marketing plan must be provided to the property management and onsite staff. Housing Sponsors are encouraged to use HUD form 935.2 or successors as applicable. The Affirmative Marketing Plan must identify methods to market the property to persons with disabilities. Additionally, the Affirmative Marketing plan must be displayed in the leasing office and available to the public on request.

§60.7. Monitoring for [~~of~~] Compliance.

(a) Monitoring after the Compliance Period: Housing Tax Credit properties allocated credit in 1990 and after are required under the Code (§42(h)(6)) to record an Extended Use Agreement as part of the LURA restricting the property for 30 years. Section 42(i)(1) defines the Compliance Period as the first 15 years of the extended use period. Various sections of the Code specify monitoring rules State Housing Finance Agencies must implement during the Compliance Period.

(b) After the first 15 years of the extended use period, the Department will continue to monitor Housing Tax Credit Developments using the rules detailed in paragraphs (1) - (15) of this subsection.

(1) On site monitoring visits will continue to be conducted approximately every three years, unless the Department determines that a more frequent schedule is necessary.

(2) In general, the Department will review 10% of the low-income files. No less than 5 files and no more than 20 files will be reviewed.

(3) A minimum of five units will be inspected. Additional units may be inspected if warranted by conditions discovered in the initial units inspected.

(4) A physical inspection of each unit shall be conducted by the owner each year using criteria set forth in the Department of Housing and Urban Development's Housing Quality Standards (HQS). Any deficiencies must be corrected and copies of the inspections and verification of repairs shall be maintained in the unit file.

(5) An inspection of all common spaces, grounds, building exteriors and building systems will be performed annually using HUD's HQS. Deficiencies must be corrected and records of the corrections must be maintained for review by Department staff.

(6) Each Development shall submit an annual report in the format prescribed by the Department.

(7) Reports to the Department must be submitted electronically as required in §60.9 of this chapter.

(8) Compliance monitoring fees will continue to be submitted to the Department annually in the amount stated in the LURA.

(9) All households must be income qualified upon initial occupancy of any low-income unit. Proper verifications of income are required, and the Department's Income Certification form must be completed unless the Development participates in the Rural Rental Housing Program or a project based HUD program.

(10) Rents will remain restricted for all low-income units. The tenant paid portion of the rent plus the applicable utility allowance must not exceed the applicable limit.

(11) Owners and managers must continue to screen households for income, assets, and household size on an annual basis. In addition, an Income Certification form must be completed on an annual basis.

(12) All additional income and rent restrictions defined in the LURA remain in effect.

(13) Other requirements defined in the LURA, such as the provision of social services or serving special needs households, will remain in effect unless specifically waived by the Department.

(14) The owner shall not terminate the lease or evict the resident or refuse to renew the lease except for material noncompliance with the lease or other good cause.

(15) The total number of required low income units must be maintained Development wide.

(c) After the first 15 years of the extended use period, certain requirements will not be monitored as detailed in paragraphs (1) - (5) of this subsection.

(1) At recertification verification of income and assets will not be required.

(2) The student restrictions found in §42(i)(3)(D) of the Code. An income qualified household consisting entirely of full time students may occupy a low-income unit.

(3) The requirement to treat transfers from building to building as a new move in. Transfers within the Development will not require household requalification.

(4) The Available Unit Rule found in Treasury Regulation §1.42-15.

(5) The building applicable fraction found in the Development's Cost Certification and/or the LURA. Low income occupancy requirements will be monitored Development wide, not building by building.

(d) Unless specifically noted in this section, all requirements of this Chapter 60 and §42 of the Internal Revenue Code remain in effect for the Extended Use Period. These Post Year 15 Monitoring Rules apply only to the Housing Tax Credit Developments administered by the Department. Participation in other programs administered by the Department may require additional monitoring to ensure compliance with the requirements of those programs.

(e) The Department may contract with an independent third party to monitor a Development during construction or rehabilitation and during operation for compliance with any conditions imposed by the Department in connection with funding or other Department oversight and appropriate state and federal laws, as required by other state law or by the Board. (§2306.6719, Texas Government Code).

§60.8. Recordkeeping.

All Development Owners must comply with program recordkeeping requirements. Records must include sufficient information to comply with the Reporting requirements of §60.9 of this chapter and any additional programmatic requirements. Records [~~In addition, records including items listed in paragraphs (1) - (12) of this section~~] must be kept for each qualified low income rental unit and building in the Development, commencing with lease up activities and continuing on a monthly basis until the end of the affordability period. Housing Tax Credit owners should refer to Treasury Regulation 1.42-5 for more information about record keeping requirements.[~~The Department requires any reports to be submitted electronically and in the format prescribed by the Department. Records must include:~~]

[~~(1) the total number of residential rental units in the Development, including the number of bedrooms;~~]

[~~(2) the move in and move out date for each residential rental unit in the Development;~~]

[~~(3) which residential rental units are low income units and the income level of the residents broken into 30, 40, 50, 60, or 80 percent of the area median income;~~]

[~~(4) the rent charged for each residential rental unit including, with respect to low income units, documentation to support the utility allowance applicable to such unit and any rental assistance received;~~]

[~~(5) the number of occupants in each low income unit;~~]

[~~(6) the low income rental unit vacancies and information that shows when and to whom all available units were rented;~~]

[~~(7) the annual income certification of each tenant of a low income unit, in the form designated by the Department, as may be modified from time to time;~~]

[~~(8) documentation to support each low income tenant's income certification, consistent with the determination of annual income and verification procedures under Section 8 of the United States Housing Act of 1937 (Section 8);~~]

[~~(9) the total number of units, reported by bedroom size, designed for individuals who are physically challenged or who have special needs and the number of these individuals served annually;~~]

[~~(10) the race and ethnicity of the residents of each Development;~~]

[~~(11) the number of units occupied by households receiving government-supported housing assistance and the type of assistance received; and~~]

[~~(12) any additional information as required by the Department.~~]

§60.9. Reporting.

(a) Each Development shall submit reports as required by the Department. Each Development that receives financial assistance or is administered by the Department, including the FDIC's Affordable Housing Program (AHP) [~~AHP~~], shall submit the information required under this section [~~Section~~] which describes the Annual Owner's Compliance Report (AOCR) required by §2306.0724, Texas Government Code. The Department requires this information be submitted electronically and in the format prescribed by the Department. Section 60.10 [~~1.11~~] of this chapter [~~title~~] contains rules [~~procedures~~] regarding filing

and penalties for failure to file reports. The first AOCR is due the year following award.

(b) [~~(1)~~] Part A, the "Owner's Certification of Program Compliance"; Part B, the "Unit Status Report"; and Part C, "Tenant Services Provided Report" of the AOCR, must be provided to the Department no later than March 1st of each year, reporting data current as of December 31 of the previous year (the reporting year) [~~January 1 of each reporting year~~]. Part D, "Owner's Financial Certification", which includes the current audited financial statements and income and expenses of the Development for the prior year, shall be delivered to the Department no later than the last day in April each year. A full description of the AOCR is contained in §60.10 of this chapter.

(c) [~~(2)~~] The Department maintains the information reported by the AOCR pursuant to §2306.0724(c), Texas Government Code in electronic and hard-copy formats available at no charge to the public.

(d) [~~(3)~~] Rental Developments [~~developments~~] funded or administered by the Department, including HOME, Housing Trust Fund (HTF) [~~HTF~~], the FDIC's AHP, and any other rental programs funded or administered through [~~by~~] the Department shall provide tenant information provided on Part B, "Unit Status Report," at least quarterly during lease up and until occupancy requirements are achieved. Once the Department has determined that all occupancy requirements are satisfied, the Development shall submit the Unit Status Report at least annually and as required by this section.

(e) [~~(4)~~] Developments financed by tax exempt bonds issued by the Department shall report quarterly throughout the Qualified Project Period unless notified by the Department of a change in the reporting frequency.

(f) [~~(6)~~] Information regarding housing for persons with disabilities. Owners of state or federally assisted housing Developments [~~developments~~] with 20 or more housing units must report information regarding housing units designed for persons with disabilities pursuant to §2306.078, Texas Government Code. This information will be reported on the Department's website and will include the following:

(1) [~~(A)~~] the name, if any, of the Development [~~development~~];

(2) [~~(B)~~] the street address of the Development [~~development~~];

(3) [~~(C)~~] the number of housing units in the Development [~~development~~] that are designed for persons with disabilities and that are available for lease;

(4) [~~(D)~~] the number of bedrooms in each housing units designed for a person with a disability;

(5) [~~(E)~~] the special features that characterize each housing unit's suitability for a person with a disability;

(6) [~~(F)~~] the rent for each housing unit designed for a person with a disability; and

(7) [~~(G)~~] the telephone number and name of the Development [~~development~~] manager or agent to whom inquiries by prospective tenants may be made.

(g) [~~(5)~~] The Department requires all Owners of properties administered by the Department to submit the Unit Status Report in the electronic format developed by the Department. The Electronic Compliance Reporting Filing Agreement and the Owner's Designation of Administrator of Accounts forms must be filed no later than January 31st of the year following the award. The Department will provide general instruction regarding the electronic transfer of data. The Department may, at its discretion, waive the online reporting requirements. In the absence of a written waiver, all Developments [~~developments~~] are required to submit Reports [~~the Unit Status Report~~] online.

(h) Data submitted to the Department by the owner of a Development that contains relevant information pursuant to §2306.072(c)(6) and §2306.0724 of the Texas Government Code shall at a minimum include:

(1) the street address and municipality or county in which the property is located;

(2) the telephone number of the property management or leasing agent;

(3) the total number of units, reported by bedroom size;

(4) the move in and move out date for each residential rental unit in the Development;

(5) the number of occupants in each low income unit;

(6) the total number of units, reported by bedroom size, designed for individuals who are physically challenged or who have special needs and the number of these individuals served annually;

(7) the rent for each type of rental unit, reported by bedroom size;

(8) the race or ethnic makeup of the residents of each project;

(9) the number of units occupied by individuals receiving government-supported housing assistance and the type of assistance received;

(10) the number of units occupied by individuals and families of extremely low income, very low income, low income, moderate income, and other levels of income, reported as 30, 40, 50, 60 or 80% of the area median income;

(11) a statement as to whether the property has been notified of a violation of the fair housing law that has been filed with the United States Department of Housing and Urban Development, the Civil Rights Division of the Texas Workforce Commission, or the United States Department of Justice;

(12) a statement as to whether the Development has any instances of material noncompliance with bond indentures or deed restrictions discovered through the normal monitoring activities that include meeting occupancy requirements or rent restrictions imposed by deed restriction or finance agreements; and

(13) the annual number of low income unit vacancies and information that shows when and to whom available units were rented.

§60.10. Annual Owner's Compliance Report Certification and Review.

(a) On or before February 1st of each year of the Affordability Period [~~affordability period~~], the Department will send [~~each rental Development Owner~~] a reminder that the Report required by §2306.0724 of the Texas Government Code (to be titled the Annual Owner's Compliance Report (AOCR) [~~AOCR~~] must be completed by the Owner and submitted to the Department on or before the applicable deadline. This reminder may be sent via email or by posting on the Department's website. The Department requires the AOCR to be submitted electronically. The AOCR shall consist of:

(1) Part A, "Owner's Certification of Program Compliance";

(2) Part B, "Unit Status Report";

(3) Part C, "Tenant Services Provided Report"; and

(4) Part D, "Owner's Financial Certification".

~~[(b) Penalties and sanctions are assessed in accordance with §1.11(d) of this title for failure to provide the AOCR in part or entirety, including administrative penalties and denial of future requests for Department funding.]~~

(b) ~~[(c)]~~ Any Development for which the AOCR, Part A, "Owner Certification of Program Compliance," is not received or is received past the due date will be considered not in compliance with these rules. If Part A is incomplete, improperly completed or not signed by the Development Owner, it will be considered not received and not in compliance with these rules. The Department will report to the IRS via form 8823, Low-Income Housing Credit Agencies Report of noncompliance or Building Disposition, any HTC Development [~~development~~] that fails to comply with this section. The AOCR Part A shall include at a minimum the following statements by the Development Owner:

(1) the Development met the minimum set aside test which was applicable to the Development;

(2) there was no change in the Applicable Fraction or low income set aside of any building, or if there was such a change, the actual Applicable Fraction is reported to the Department (HTC only);

(3) the Development Owner has received an annual income certification from each low income resident and documentation to support that certification, in the manner and form required by the Department's Compliance Manual(s), as may be amended from time to time;

(4) documentation is maintained to support each low income tenant's income certification, consistent with the determination of annual income and verification procedures under Section 8 of the United States Housing Act of 1937 (Section 8), notwithstanding any rules to the contrary for the determination of gross income for federal income tax purposes. In the case of a tenant receiving housing assistance payments under Section 8, the documentation requirement is satisfied if the public housing authority provides a statement to the Development Owner declaring that the tenant's income does not exceed the applicable income limit under §42(g) of the IRC as described in the Compliance Manual(s);

(5) each low income unit in the Development was rent-restricted under the LURA and applicable program regulations, including §42(g)(2) of the IRC, or 24 CFR Part 92, and the owner maintained documentation to support the utility allowance applicable to such unit;

(6) all low income units in the Development are and have been for use by the general public and used on a non-transient basis (except for transitional housing for the homeless provided under §42(i)(3)(B)(iii)) of the IRC (HTC and BOND only);

(7) no finding of discrimination under the Fair Housing Act, 42 U.S.C. 3601-3619, has occurred for this Development. A finding of discrimination includes an adverse final decision by the Secretary of HUD, 24 CFR 180.680, an adverse final decision by a substantially equivalent state or local fair housing agency, 42 U.S.C. 3616a(a)(1), or an adverse judgment from a federal court;

(8) each unit or building in the Development is, and has been, suitable for occupancy, taking into account Uniform Physical Condition Standards (UPCS) (24 CFR 5.703) or local health, safety, and building codes, and the state or local government unit responsible for making building code inspections did not issue a report of a violation for any building or low income unit in the Development during this reporting period. If a violation report or notice was issued by the governmental unit during this reporting period, the Development Owner must provide the Department with a copy of the violation report or notice. In addition, the Development Owner must state whether the violation has been corrected;

(9) each unit has been inspected annually and each unit meets conditions set by HUD Housing Quality Standards (HOME only);

(10) there has been no change in the Eligible Basis (as defined by the Code [~~§42(d) of the IRC~~]) for any building in the Development since the last certification or, if change(s), the nature of the change (HTC only);

(11) all tenant facilities included in the original application, such as swimming pools, other recreational facilities, washer/dryer hook ups, appliances and parking areas, were provided on a comparable basis to any tenants in the Development;

(12) Residents have not been charged for the use of any nonresidential portion of the building that was included in the building's Eligible Basis under the Code [~~§42(d) of the IRC~~] (HTC only);

(13) if a low income unit in the Development became vacant during the year, reasonable attempts were made, or are made, to rent that unit or the next available unit of comparable or smaller size to a qualifying low income household before any other units in the Development were, or will be, rented to non low income households (HTC and BOND only);

(14) if the income of tenants of a low income unit in the Development increased above the appropriate limit allowed, the next available unit of comparable or smaller size was, or will be, rented to residents having a qualifying income;

(15) a LURA including an Extended Low Income Housing Commitment as described in §42(h)(6) of the Code [~~IRC~~] was in effect for buildings subject to §7108(c)(1) of the Omnibus Budget Reconciliation Act of 1989, 103 Stat. 2106, 2308 - 2311, including the requirement under §42(h)(6)(B)(iv) of the Code [~~IRC~~], that a Development Owner cannot refuse to lease a unit in the Development to an applicant because the applicant holds a voucher or certificate of eligibility under Section 8 of the United States Housing Act of 1937, 42 U.S.C. 1437f (for buildings subject to §1314c(b)(4) of the Omnibus Budget Reconciliation Act of 1993, 107 Stat. 312, 438 - 439) (HTC only);

(16) the Development Owner has not been notified by the IRS that the Development is no longer "a qualified low income housing Development" within the meaning of the Code [~~§42 of the IRC~~] (HTC only);

(17) if the Development Owner is required to be a Qualified Nonprofit Organization under §42(h)(5) of the Code [~~IRC~~], that a Qualified Nonprofit Organization owned an interest in and materially participated in the operation of the Development within the meaning under §469(h) of the Code [~~IRC~~] (HTC only);

(18) no low income units in the Development were occupied by ineligible full time student households (HTC and BOND only);

(19) no change in the ownership of the Development has occurred during the reporting period or changes and transfers were or are reported;

(20) the Development met all representations of the Development Owner in the Application and complied with all terms and conditions which were recorded in the LURA;

(21) the Development has made all required lender deposits, including annual reserve deposits;

(22) the street address and municipality or county in which the Development is located;

(23) the name, address, contact person, and telephone number of the property management or leasing agent;

(24) that no tenants in low-income units were evicted or had their tenancies terminated, including non-renewal of a lease, other than for good cause and that no tenants had an increase in the gross rent with respect to a low-income unit not otherwise permitted under the Code [~~§42 of the IRC~~] (HTC and HOME only);

(25) The name and mailing address of the syndicator and lender (HTC only);

(26) [~~(25)~~] any additional information as required by the Department.

(c) [~~(d)~~] Review. Department staff will review Part A of the AOCR for compliance with the requirements of the appropriate program including the Code [~~§42 of the IRC~~].

(d) Sanctions.

(1) If the report is not received on or before March 1, a notice of noncompliance will be sent to the owner specifying a reasonable amount of time, as determined by the Department, to submit the report prior to the imposition of any sanction.

(2) If the report is not received on or before the corrective action deadline the Department shall:

(A) For all HTC properties, issue form 8823 notifying the Internal Revenue Service of the violation.

(B) For all properties, score the noncompliance in accordance with §60.18 of this chapter.

(3) In addition, in accordance with the provisions of §2306.0724 of the Texas Government Code, the Executive Director of the Department may assess and enforce the following sanctions against a housing sponsor who fails to submit the AOCR on or before March 1 of each year. These sanctions will only be assessed for multiple, consistent and/or repeated violations of failure to submit the AOCR by March 1 of each year.

(A) Impose a late processing fee in an amount equal to $1,000;

(B) Subject the Housing Sponsor to 10 TAC §1.13; or

(C) An HTC Development that three years in a row fails to submit required information to the Department may be reported to the Internal Revenue Service as no longer in compliance and never expected to comply.

§60.11. Record Retention Provisions.

(a) Each Development that is administered by the Department including the FDIC's AHP is required to retain the records as required by the specific funding program rules and regulations. In general, retention schedules include but are not limited to the provision of subsections (b) - (e) [~~paragraphs (1) - (4)~~] of this section.

(b) [~~(1)~~] HTC records, as described in §60.8 of this chapter, must be retained for at least six years after the due date (with extensions) for filing the federal income tax return for that year; however, the records for the first year of the Credit Period must be retained for at least six years beyond the due date (with extensions) for filing the federal income tax return for the last year of the Compliance Period of the building.

(c) [~~(2)~~] Retention of records for HOME rental Developments [~~developments~~] must comply with the provisions of 24 CFR 92.508(c) which generally requires retention of rental housing records for five years after the affordability period terminates.

(d) [~~(3)~~] Housing Trust Fund (HTF) [~~HTF~~] rental Developments [~~developments~~] must retain tenant files for at least three years beyond the date the tenant moves from the Development [~~development~~]. Records pertinent to the funding of the award, including but not limited to the application, development costs and documentation, must be retained for at least five years after the affordability period terminates.

(e) [~~(4)~~] Other rental Developments funded or administered in whole or in part by the Department must comply with record retention requirements as required by rule or deed restriction.

§60.12. Inspection Provision.

(a) The Department retains the right to perform an on-site inspection of any low income Development, and review and photocopy all documents and records supporting compliance with Departmental programs through the end of the Compliance Period or the end of the period covered by any Extended Low Income Housing Commitment, whichever is later.

(b) [~~(1)~~] The Department will perform on-site inspections and file reviews of each low income Development. The Department will conduct the first review of HTC Developments by the end of the second calendar year following the year the last building in the Development is placed in service. The Department will schedule the first review of all other Developments as leasing commences. Subsequent reviews will occur at least once every three years during the Affordability Period [~~compliance period~~]. The Department will monitor a sampling [~~at least 15%~~] of the low income resident files in each Development, and review the income certifications, the documentation the Development Owner has received to support the certifications, the rent records and any additional information that the Department deems necessary. The Department will also conduct a physical inspection of the Development including the exterior of the Development [~~development~~], development amenities, and an interior inspection of a sample of units.

(c) [~~(2)~~] The Department may, at the time and in the form designated by the Department, require the Development Owners to submit information on tenant income and rent for each low income unit and may require a Development Owner to submit copies of the tenant files, including copies of the income certification, the documentation the Development Owner has received to support that certification, and the rent record for any low income tenant.

(d) [~~(3)~~] The Department will select the low income units and tenant records that are to be inspected and reviewed. Original records are required for review. The Department will not give Development Owners advance notice that a particular unit, tenant records, or a particular year will be inspected or reviewed. However, the Department will give reasonable notice to the Development Owner that an on-site inspection or a tenant record review will occur so the Development Owner may notify tenants of the inspection or assemble original tenant records for review.

(e) [~~(4)~~] The Department will conduct a limited inspection for compliance with accessibility requirements under the Fair Housing Act or §504 of the Rehabilitation Act of 1973. If determined necessary the Department may make referrals to appropriate federal and state agencies or order third-party inspections to be paid for by the Development owner.

(f) [~~(5)~~] Exception: The Department may, at its discretion, enter into a Memorandum of Understanding with the TX-USDA-RHS, whereby the TX-USDA-RHS agrees to provide to the Department information concerning the income and rent of the tenants in buildings financed under its Section 515 program. Owners of such buildings may be exempted from the inspection provisions; however, if the information provided by TX-USDA-RHS is not sufficient for the Department to make a determination that the income limitation and rent restrictions

are met, the Development Owner must provide the Department with additional information, or the Department will inspect according to the provisions contained herein. TX-USDA-RHS Developments satisfy the definition of Qualified Elderly Development if they meet the definition for elderly used by TX-USDA-RHS, which includes persons with disabilities.

§60.13. Inspection Standard.

(a) Developments must be maintained to be decent, safe, sanitary and in good repair throughout the affordability period. For all programs, the Department will use HUD's Uniform Physical Condition Standards (UPCS) to determine compliance with property condition. In addition, Developments must comply with all local heath, safety, and building codes. The Department may contract with a third party to complete UPCS inspections. HTC Developments that fail to comply with local codes or UPCS must be reported to the IRS.

(b) To determine compliance with property condition standards the Department will [~~shall~~] review any local health, safety, or building code violation reports, or notices in the absence of local health, safety and building code violation reports. If deemed necessary by the Department, inspections by third-party inspectors may be requested and will be relied upon to determine compliance with property condition standards. In addition to the review of any local health, safety or building code violation reports, the Department may conduct inspections of the units using HUD's Housing Quality Standards or UPCS and may use those standards to determine compliance with property condition standards. Developments must be maintained to be decent, safe, sanitary and in good repair throughout the affordability period. HTC Developments that fail to comply with local codes or UPCS must be reported to the IRS.

(c) The Department will evaluate UPCS reports in the following manner:

(1) A finding of Major Violations will be assessed if:

(A) Any life threatening health, safety, or fire safety hazards are reported on the Notification of Exigent and Fire Safety Hazards Observed form in any building exterior, building system, common area, site, or dwelling unit; or

(B) 25% or more of buildings or dwelling units inspected have the same reported health or safety deficiencies

(2) A finding of Minor Violations will be assessed if:

(A) The same Level two or Level three deficiency (not a health or safety deficiency) is listed for 25% or more of the buildings or dwelling units inspected; or

(B) An overall UPCS score of less than 60% (59% or below) is reported.

(3) Findings of both Major and Minor Violations may be assessed if deficiencies reported meet the criteria for both.

(4) Property representatives will have an opportunity to correct deficiencies while the inspector is on site. Such corrected items will not be assessed a finding unless there is a pattern of the same violation (25% or more of dwelling units or buildings inspected with the same deficiency).

(5) Acceptable evidence of correction of deficiencies is a certification from an appropriate licensed professional that the item now complies with the inspection standard or other documentation that the violation has been corrected.

(6) For Developments with no findings of Major or Minor Violations, the review letter will state that the owner is responsible for correcting any items noted in the report. However, the letter will not require the owner to report back that the items have been cured.

(7) If there are findings of noncompliance, the Department will provide a standard 90 day corrective action period. The Department will grant up to an additional 90 day extension if there is good cause and the owner clearly requests an extension.

§60.17. Utility Allowances.

(a) The Department will monitor to determine if HTC and BOND properties comply with published rent limits, which include an allowance for utilities. If residents are responsible for some or all utilities, Development owners must use a Utility Allowance that complies with §1.42-10 of the IRC. [~~If there is more than one entity (Section 8 administrator, public housing authority) responsible for setting the utility allowance(s) in the area of the Development location, then the Utility Allowance selected must be the one which most closely reflects the actual utility costs in that Development area. In this case, documentation from the local utility provider supporting the selection must be provided.~~]

(b) Properties within the operational area of a municipal housing authority must use the allowance issued by that municipal housing authority if they select the PHA method for establishing a utility allowance. (See Local Government Code Chapter 392)

(c) Properties outside the operational area of a municipal housing authority and within the operational area of a county housing authority must use the utility allowance issued by the county housing authority if they select the PHA method for establishing a utility allowance. (See Local Government Code Chapter 392)

(d) [~~(b)~~] The Department will monitor to determine if HOME and HTF Developments comply with published rent limits, which include an allowance for utilities. Unless otherwise approved by the Department, HOME and HTF Developments must use the utility allowance established by the applicable housing authority. Changes in utility allowances must be implemented on the published effective date.

(e) HTC developments that elect to use a written local estimate must obtain a written update within one year of the last written update. Developments that fail to obtain an update will be monitored using the applicable Public Housing Authority allowance 90 days after the written local estimate expires.

(f) If the applicable Public Housing Authority adopts an "energy efficient" utility allowance and an allowance for all other properties, the "energy efficient" allowance is valid until the applicable Public Housing Authority adopts new allowances. If the applicable Public Housing Authority subsequently adopts an allowance without regard for energy efficiency, the Development must implement that allowance within 90 days of the change.

(g) If the applicable Public Housing Authority lists flat fees for any utility, those flat fees must be included in the calculation of the utility allowance if the resident is responsible for that utility. This does not apply if the Development uses a written local estimate in accordance with Treasury Regulation 1.42-10.

§60.18. Material Noncompliance.

(a) For all programs, a Development will be in material noncompliance if the noncompliance is stated in this section to be material noncompliance. Developments with more than one program administered by the Department will be scored by program. The Development will be considered in material noncompliance if the score for any single program exceeds the noncompliance limit for that program. The Department may take into consideration the representations of the Applicant regarding compliance violations; however, the records of the Department are controlling.

(b) [~~(1)~~] Each Development [~~development~~] that is funded or administered by the Department will be scored according to the type and number of noncompliance events as it relates to the HTC program or other Department programs. All Developments, regardless of status, that are or have been administered, funded, or monitored by the Department are scored even if the Development [~~development~~] no longer actively participates in the program. Unless otherwise specified below, under the HTC program, noncompliance events issued on Form 8823 are assigned point values. For other programs administered by the Department, unless otherwise specified below, noncompliance events identified during on-site monitoring reviews are assigned point values.

(c) [~~(2)~~] Uncorrected noncompliance, if applicable to the Development, will carry the maximum number of points until the noncompliance event has been reported corrected by the Department. Once reported corrected by the Department, the score will be reduced to the "corrected value". Corrected noncompliance will no longer be included in the Development score three years after the date the noncompliance was reported corrected by the Department.

(1) [~~(A)~~] Under the HTC program, noncompliance events that occurred and were identified by the Department through the issuance of the IRS Form 8823 prior to January 1, 1998, are assigned corrected point values to each noncompliance event. The score for these events will no longer be included in the Development's score.

(2) [~~(B)~~] The score in effect on May 1st of the year the HTC program application is submitted, during final application for Developments applying for participation in the BOND program, HOME program or HTF program, or during application review of any other program funded or administered by the Department will determine if any Development [~~rental development~~] disclosed on previous participation forms is in material noncompliance.

(3) [~~(C)~~] The Department will not execute a Carryover Allocation Agreement with any Owner in Material Noncompliance on October 1, 2007 [~~2006~~].

(4) [~~(D)~~] Any corrective action documentation affecting the compliance status score must be received by the Department thirty days prior to the application deadline for HTC applications, [~~date the HTC program Application Round closes,~~] thirty days prior to the submission of Volume I of the application for a BOND Development, or thirty days before the submission of an application for any other program funded or administered by the Department.

(5) The Department will not approve the transfer of ownership of any property regulated by the Department to a party in Material Noncompliance.

(d) A Development's score will be reduced by the number of points needed to be one point under the Material Noncompliance threshold under the following circumstances:

(1) the Development has no uncorrected issues of noncompliance, and

(2) all issues of noncompliance were corrected during the corrective action period, and

(3) all corrective action documentation was provided to the Department during the corrective action period.

(e) treatment of previously owned Developments during a Previous Participation review.

(1) The Department will not take into consideration the score of a Development transferred by the applicant over three years ago.

(2) If the property was transferred less than three years ago, the Department will determine the score for the noncompliance events with a date of noncompliance identified during the applicant's period of ownership. If the points associated with the noncompliance events identified during the applicant's period of ownership exceed the threshold for Material Noncompliance, the application will not be recommended.

(f) [~~(3)~~] Events of noncompliance are categorized as either "development events" or "unit/building events". Development events of noncompliance affect some or all the buildings in the Development [~~development~~]; however, theDevelopment [~~development~~] will receive only one score for the event rather than a score for each building. Other types of noncompliance are identified individually by unit. This type of noncompliance will receive the appropriate score for each unit cited with an event. The unit scores and the Development [~~development~~] scores accumulate towards the total score of the Development. Violations under the HTC program are identified by unit; however, the building is scored rather than the unit and the building will receive the noncompliance score if one or more of the units are in noncompliance.

(g) [~~(4)~~] Each type of noncompliance is assigned a point value. The point value for noncompliance is reduced upon correction of the noncompliance. The scoring point system and values are as described in subsections (h) and (i) of this section [~~subparagraphs (A) and (B) of this paragraph~~]. The point system weighs certain types of noncompliance more heavily than others; therefore certain noncompliance events automatically place the Development [~~development~~] in Material Noncompliance. However, other types of noncompliance, by themselves, do not warrant the classification of Material Noncompliance. Multiple occurrences of these types of noncompliance events may produce enough points to cause the Development [~~development~~] to be in Material Noncompliance.

(h) [~~(A)~~] Development Noncompliance items are identified in paragraphs (1) - (27) of this subsection [~~clauses (i) - (xviii) of this subparagraph~~].

(1) [~~(i)~~] Major property condition violations. The property condition does not meet Uniform Physical Condition Standards as described in §60.13 of this chapter or [~~development~~] displays major violations of health, safety and building codes. Uncorrected, this is material noncompliance. Uncorrected is equal to the material noncompliance status threshold score as defined in §60.2(11)[~~(7)~~] of this chapter. Corrected is 10 points.

(2) [~~(ii)~~] Owner refused to lease to a holder of rental assistance certificate/voucher because of the status of the prospective tenant as such a holder. Uncorrected, this is material noncompliance. Uncorrected is equal to the material noncompliance status threshold score as defined in §60.2(11)[~~(7)~~] of this chapter. Corrected is 10 points.

(3) [~~(iii)~~] Development is not available to general public. The IRS will be notified of HTC Developments [~~developments~~] reported to the Department, according to the Memorandum of Understanding among the U.S. Department of Treasury, the Department of Housing and Urban Development, and the Department of Justice, to be under investigation of possible violations of the Fair Housing Act. No points are imposed.

(4) [~~(iv)~~] Determination of a violation under the Fair Housing Act. Uncorrected, this is material noncompliance. Uncorrected is equal to the material noncompliance status threshold score as defined in §60.2(11)[~~(7)~~] of this chapter. Corrected is 10 points.

(5) [~~(v)~~] Development is out of compliance and never expected to comply. Uncorrected, this is material noncompliance. Uncorrected is equal to the material noncompliance status threshold score

as defined in §60.2(11)[(7)] of this chapter. No correction is possible; no corrected score assigned.

(6) [(vi)] Owner failed to pay fees or allow on-site monitoring review. Points will be assigned to this event after written notification to the Development owner. Uncorrected, this is material noncompliance. Uncorrected is equal to the material noncompliance status threshold score as defined in §60.2(11)[(7)] of this chapter. Corrected is 5 points.

(7) [(vii)] LURA not in effect. The LURA was not executed within the required time period. Uncorrected, this is material noncompliance. This event will be assigned points upon written notification to the owner. Uncorrected is equal to the material noncompliance status threshold score as defined in §60.2(11)[(7)] of this chapter. Corrected is 5 points.

(8) [(viii)] Developments awarded HTC January 1, 2004, or later, that are foreclosed by a lender, or the General Partner is removed by a syndicator due to reasons other than market conditions. Points associated with a foreclosure will be assigned at the time the 8823 is sent to the IRS. Points associated with the removal of the General Partner will be assigned upon written notification to the former General Partner. 25 points. No correction is possible; no corrected score assigned.

(9) [(ix)] Development failed to meet minimum low-income occupancy levels. Development failed to meet required minimum low-income occupancy levels of 20/50 (20% of the units occupied by tenants with household incomes of less than or equal to 50% of Area Median Gross Income) or 40/60. Uncorrected is 20 points. Corrected is 10 points. (HTC and BOND only)

(10) [(x)] No evidence of, or failure to certify to, non-profit material participation for an Owner having received an allocation from the Nonprofit Set-Aside. Uncorrected is 10 points. Corrected is 3 points.

(11) [(xi)] The Development failed to meet additional State required rent and occupancy restrictions. The LURA requires the Development to lease units to low income households at multiple income and rent tiers. This event refers to the condition when the lower tiers are not satisfied. Uncorrected is 10 points. Corrected is 3 points.

(12) [(xii)] The Development failed to provide required supportive services as promised at Application. Uncorrected is 10 points. Corrected is 3 points.

(13) [(xiii)] The Development failed to provide housing to the elderly as promised at Application. Uncorrected is 10 points. Corrected is 3 points.

(14) [(xiv)] Failure to provide special needs housing. Development has failed to provide housing for tenants with special needs as promised at Application. Uncorrected is 10 points. Corrected is 3 points.

[(xv) The Development Owner failed to provide required annual notification to the local administering agency for the Section 8 program. Uncorrected is 5 points. Corrected is 2 points.]

(15) [(xvi)] Changes in Eligible Basis. Changes occur when common areas become commercial, fees are charged for facilities, etc. Uncorrected is 10 points. Corrected is 3 points. (HTC only)

[(xvii) Owner failed to post Fair Housing Logo and/or poster in leasing offices. Uncorrected is 3 points. Corrected is 1 point.]

(16) [(xviii)] Failure to submit part or all of the AOCR or failure to submit any other annual, monthly, or quarterly report required by the Department. Uncorrected is 10 points. Corrected is 3 points.

[(xix) Owner failed to make available or maintain a management plan with required language as required under §1.14 of this title. Uncorrected is 3 points. Corrected is 1 point.]

(17) [(xx)] Owner failed to approve and distribute an Affirmative Marketing Plan as required under §60.6 [§1.14] of this chapter [title]. Uncorrected is 3 points. Corrected is 1 point.

(18) [(xxi)] Pattern of minor property condition violations. Development does not meet Uniform Physical Condition Standards as described in §60.13 of this chapter or displays a pattern of property violations; however, those violations do not impair essential services and safeguards for tenants. Uncorrected is 10 points. Corrected is 5 points.

(19) [(xxii)] Development failed to comply with requirements limiting minimum income standards for Section 8 residents. Complaints verified by the Department regarding violations of the income standard which cause exclusion from admission of Section 8 resident(s) results in a violation. Uncorrected score 10 points. Corrected 3 points.

(20) [(xxiii)] Owner defaults on payments of Department loans for a period exceeding 90 days. Uncorrected, this is material noncompliance. Points will be assigned under this event after written notice to the Development Owner. Uncorrected is equal to the material noncompliance status threshold score as defined in §60.2(11)[(7)] of this chapter. Corrected is 10 points.

(21) [(xxiv)] Utility Allowance not calculated properly. Uncorrected 3 points. Corrected 1 point.

(22) [(xxv)] Failure to comply with the Next Available Qualifying Unit Rule. Uncorrected 3 points. Corrected 1 point.

(23) [(xxvi)] Owner failed to execute required lease provisions or exclude prohibited lease language. Uncorrected 3 points. Corrected 1 point (All programs except HTC)

(24) [(xxvii)] Failure to provide annual Housing Quality Standards inspection. Uncorrected 10 points. Corrected 3 points. (HOME and post compliance period HTC properties Only)

(25) [(xxviii)] Development has failed to establish and maintain a reserve account in accordance with §1.37 of this title. Points will be assigned under this event after written notice to the Development Owner. Uncorrected, this is material noncompliance. Uncorrected is equal to the material noncompliance status threshold score as defined in [paragraph] §60.2(11)[(7)] of this chapter. Corrected is 10 points.

(26) Development substantially changed the scope of services as presented at initial application without prior department approval. Uncorrected 4 points. Corrected 0 points.

(27) Change in ownership or General Partner without proper notification to and approval of Department. Uncorrected 4 points, corrected 0 points.

(i) [(B)] Unit Noncompliance items are identified in paragraphs (1) - (12) [clauses (i) - (xi)] of this subsection [subparagraph].

(1) [(i)] Unit not leased to Low Income Household. Development has units that are leased to households whose income was above the income limit upon initial occupancy. Uncorrected is 5 [3] points. Corrected is 1 point.

(2) [(ii)] Low-income units occupied by nonqualified full-time students. Uncorrected is 3 points. Corrected is 1 point. (HTC Developments during the Compliance Period and BOND only)

(3) [~~(iii)~~] Low income units used on transient basis. Uncorrected is 3 points. Corrected is 1 point. (HTC and BOND only)

(4) [~~(iv)~~] Household income increased above the re-certification limit and an available Unit was rented to a market tenant. (HTC Developments during the Compliance Period). Uncorrected is 3 points. Corrected is 1 point.

(5) [~~(v)~~] Gross rent exceeds the highest rent allowed under the LURA or other deed restriction. Uncorrected is 5 [~~3~~] points. Corrected is 1 point.

(6) [~~(vi)~~] Failure to maintain or provide tenant income certification and documentation. Uncorrected is 3 points. Corrected is 1 point.

(7) [~~(vii)~~] Casualty loss. Units not available for occupancy due to natural disaster or hazard due to no fault of the Owner. This carries no point value. Casualty losses are reported to the IRS on HTC Developments.

(8) [~~(viii)~~] When a low income Unit became vacant, owner failed to lease (or make reasonable efforts to lease) to a low income household before any units were rented to tenants not having a qualifying income. Uncorrected is 3 points. Corrected is 1 point.

(9) [~~(ix)~~] Unit not available for rent. Unit is used for non-residential purposes excluding unavailable Units due to casualty and manager-occupied Units. Uncorrected is 3 points. Corrected is 1 point.

(10) [~~(x)~~] Qualifying unit designation removed from household. Uncorrected is 3 points. Corrected is 1 point. (FDIC's AHP only)

(11) [~~(xi)~~] Development evicted or terminated the tenancy of a low income tenant for other than good cause. Uncorrected is 10 points. Corrected is 3 points. (HTC and HOME only)

(12) Household income increased above 80% at recertification and owner failed to properly determine rent. (HOME only) Uncorrected 3 points. Corrected 1 point.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 22, 2006.

TRD-200606893
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: February 4, 2007
For further information, please call: (512) 475-4595

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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 1. GENERAL ADMINISTRATION
SUBCHAPTER P. NEGOTIATION AND MEDIATION OF A CLAIM OF BREACH OF CONTRACT

28 TAC §§1.1807, 1.1809, 1.1815

The Texas Department of Insurance (Department) proposes amendments to §§1.1807, 1.1809, and 1.1815, concerning negotiation and mediation of certain breach of contract claims asserted by contractors against the Department. The proposed amendments are necessary to address certain statutory provisions regarding the negotiation and mediation of certain breach of contract claims. HB 1940, enacted by the 79th Legislature, Regular Session, effective September 1, 2005, shortened some of the timeframes related to negotiation and mediation of breach of contract claims against the state. Title 28, Chapter 1, Subchapter P, of the Texas Administrative Code establishes procedures regarding negotiation and mediation of certain claims of breach of contract asserted by a contractor against the Department under the Government Code, Chapter 2260. Chapter 2260 of the Government Code requires state agencies to adopt rules to govern the negotiation and mediation of certain claims for breach of contract.

The proposed amendments to §§1.1807, 1.1809, and 1.1815 change the required timeframes for complying with Chapter 2260 to be consistent with the newly enacted legislation. The proposed amendment to §1.1807(c) changes the number of days that the notice of counterclaim must be delivered to the contractor after the Department's receipt of the contractor's notice of claim from 90 days to 60 days. The proposed amendment to §1.1809(b) changes the number of days that the parties shall begin negotiations from 60 days following the later of: (i) the date of termination of the contract; (ii) the completion date, or substantial completion date in the case of construction projects, in the original contract; or (iii) the date the Department receives the contractor's claim of notice to 120 days following the date the Department receives the contractor's notice of claim. The proposed amendment to §1.1809(h) changes the number of days that the parties may agree to mediate the dispute from before the 270th day to the 120th day after the Department receives the contractor's notice of claim or before the expiration of any extension agreed to by the parties. The proposed amendment to §1.1815(a) changes the number of days that the parties may agree to mediate the dispute at any time before the 270th day to the 120th day after the Department receives notice of the claim of breach of contract or before the expiration of any extension agreed to by the parties in writing.

Karen Phillips, Senior Associate Commissioner and Chief of Staff, has determined that, for each year of the first five years the proposed amendments are in effect, there will be no fiscal impact on state or local government, local employment, or local economies as a result of enforcing or administering the amendments.

Ms. Phillips also has determined that, for each year of the first five years the proposed amendments are in effect, the public benefits anticipated as a result of the proposed amendments will be consistency of the Department's rules concerning negotiation and mediation of certain breach of contract claims asserted by contractors against the Department with the relevant state law and shorter timeframes for dealing with these types of claims. There are no costs associated with the adoption of these rules. However, if there are any such additional costs, the costs are the result of the legislative enactment of HB 1940 by the 79th Legislature, Regular Session, effective September 1, 2005, and are not a result of the adoption of the proposed amendments. Accordingly, the proposed amendments will not have an impact on small and micro businesses. The Department has consid-

ered the purposes of the relevant statute, which is to establish procedures and timeframes regarding negotiation and mediation of certain claims of breach of contract asserted by a contractor against the Department, and has determined that it is neither legal nor feasible to waive or modify the proposed timeframe requirements for small or micro businesses.

To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on February 5, 2007 to Gene C. Jarmon, General Counsel and Chief Clerk, P.O. Box 149104, MC 113-2A, Austin, Texas 78714-9104. An additional copy of the comment must be simultaneously submitted to Cynthia Villarreal-Reyna, Section Chief, Agency Counsel Section, Legal Services Division, P.O. Box 149104, MC 110-1A, Austin, Texas 78714-9104. Any request for a public hearing on the proposed amendments should be submitted separately to the Office of the Chief Clerk before the close of the public comment period. If a hearing is held, written and oral comments presented at the hearing will be considered.

The amendments are proposed under the Government Code, Chapter 2260 and the Insurance Code, §36.001. The Government Code, §2260.052(c) provides that each unit of state government with rulemaking authority shall develop rules to govern the negotiation and mediation of a claim of breach of contract. The Insurance Code, §36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

The proposed amendments affect negotiation and mediation procedures pursuant to the following statutes: Government Code, §§2260.051, 2260.052, and 2260.056.

§1.1807. Agency Counterclaim.

(a) - (b) (No change.)

(c) The notice of counterclaim shall be delivered to the contractor no later than 60 [~~90~~] days after the department's receipt of the contractor's notice of claim.

(d) (No change.)

§1.1809. Timetable.

(a) (No change.)

(b) Subject to subsection (c) of this section, the parties shall begin negotiations within a reasonable period of time, not to exceed 120 [~~60~~] days following the [~~later of:~~]

[~~(1) the date of termination of the contract;~~]

[~~(2) the completion date, or substantial completion date in the case of construction projects, in the original contract; or~~]

[~~(3)~~] [~~the~~] date the department receives the contractor's notice of claim.

(c) - (g) (No change.)

(h) The parties may agree to mediate the dispute at any time before the 120th [~~270th~~] day after the department receives the contractor's notice of claim or before the expiration of any extension agreed to by the parties pursuant to subsection (f) of this section. The mediation shall be governed by §1.1816 of this subchapter (relating to Mediation of Contract Disputes).

(i) (No change.)

§1.1815. Mediation Timetable.

(a) The contractor and the department may agree to mediate the dispute at any time before the 120th [~~270th~~] day after the department receives a notice of claim of breach of contract, or before the expiration of any extension agreed to by the parties in writing.

(b) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 21, 2006.

TRD-200606876
Gene Jarmon
Chief Clerk and General Counsel
Texas Department of Insurance
Earliest possible date of adoption: February 4, 2007
For further information, please call: (512) 463-6327

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CHAPTER 3. LIFE, ACCIDENT AND HEALTH INSURANCE AND ANNUITIES
SUBCHAPTER MM. PREFERRED MORTALITY TABLES

28 TAC §§3.9401 - 3.9404

The Texas Department of Insurance proposes new Subchapter MM, §§3.9401 - 3.9404, concerning the optional use of preferred mortality tables for life insurance policies issued on and after January 1, 2007, excluding any disability and accidental death benefits in such policies. These new sections are necessary to allow the use of preferred mortality tables for valuation purposes only. Insurance Code Article 3.28 authorizes a company to use any ordinary mortality table that is adopted after 1980 by the National Association of Insurance Commissioners and approved by regulation promulgated by the Commissioner. In September 2006, the National Association of Insurance Commissioners adopted ordinary mortality tables that reflect differences in mortality between preferred and standard lives in determining minimum reserve liabilities.

Proposed §3.9401 specifies the purpose of the subchapter. Proposed §3.9402 sets forth definitions used in the subchapter. Proposed §3.9403 allows an insurer to substitute the 2001 Preferred Class Structure Mortality Table in place of the 2001 CSO Smoker or Nonsmoker Mortality Table as the minimum valuation standard for policies issued on or after January 1, 2007 and adopts the 2001 Preferred Class Structure Mortality Table by reference. Proposed §3.9404 sets out conditions on the use of the 2001 Preferred Class Structure Mortality Table and requires each insurer that opts to use the preferred mortality tables to file statistical reports showing experience, which can be used in future updates to the preferred mortality tables.

Betty Patterson, Senior Associate Commissioner, Financial Program, has determined that for each year of the first five years the proposed sections will be in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the sections. There will be no measurable effect on local employment or the local economy as a result of the proposal.

Ms. Patterson has also determined that for each year of the first five years the proposed new sections are in effect, the antici-

pated public benefits include enhanced availability of life insurance coverage and reduced need for price increases to cover redundant reserves. Such public benefits are more prominent for term life insurance covering insureds who are in excellent health (super preferred risks) and good health (preferred risks) based on underwriting criteria at issue.

An insurer may use the preferred mortality tables authorized by this rule at its option. Costs for insurers that choose to implement the 2001 Preferred Class Structure Mortality Table include actuarial costs and programming costs. Actuarial costs would include required annual certifications, reserve calculations, workpapers, and reporting of experience, though reporting experience will not be required until reporting requirements have been adopted by the Commissioner. Actuarial hourly rates range from $25 (for actuarial students) to over $200 (for fully credentialed actuaries). Hourly rates for programming would range from $25 to $120. The Department anticipates, however, that costs of compliance will be significantly offset by savings in costs otherwise needed to support redundant reserves such as reinsurance costs. Subsequent and ongoing costs of compliance are believed to be substantially less than the initial costs of compliance. For companies that choose to implement these tables, there will be some fixed costs related to the initial and annual actuarial certification(s). However, most of the impact of these requirements is believed to be more directly correlated to the amount of term life business issued to preferred risks for which a company implements these tables than to the size of the company. Based on input from the insurance industry, reserves may be expected to decrease by an average of 15 percent to 18 percent for issue ages 25 and 35 and an average of 12 percent to 14 percent for issue ages 45 and 55 for term life products using these preferred tables. This is based on a term life coverage of 20 years with level premiums, level death benefits, and a prior reserve table of 2001 CSO Nonsmoker without use of the select factors, with prevalence factors of 35 percent super preferred, 35 percent preferred, and 30 percent residual lives. The reserve reductions by company will vary depending on the prevalence of super preferred, preferred, and residual risks written. (Residual risks are those insureds that were not deemed super preferred or preferred risks based on underwriting criteria at issue.) Small or micro businesses may be affected to the extent that there are small insurance companies who underwrite preferred risks. Even if the proposal may have an adverse effect on small and micro-business, the proposal is optional for them, as it is for all businesses. The Department has considered the purpose of the applicable statute, which is to enable the use of preferred mortality tables, and has determined that it is neither legal nor feasible to waive the provisions of the proposal for insurers that qualify as small or micro-businesses under Government Code §2006.001 and that opt to use the preferred mortality tables. Additionally, it is the Department's position that to waive or modify the requirements of the proposed new sections for small or micro-businesses could result in a disparate effect on policyholders and other persons affected by the proposed sections.

To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on February 5, 2007, to Gene C. Jarmon, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comment must be simultaneously submitted to Betty Patterson, Senior Associate Commissioner, Financial Program, Mail Code 305-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. Any request for a public hearing should be submitted separately to the Office of the Chief Clerk before the close of the public comment period. If a hearing is held, oral and written comments presented at the hearing will be considered.

The new sections are proposed under the Insurance Code Article 3.28 and §36.001. Article 3.28, §3(a)(iii) provides for the use of any ordinary mortality table adopted after 1980 by the National Association of Insurance Commissioners that is approved by regulation promulgated by the Commissioner for use in determining the minimum standard valuation for life insurance policies, excluding any disability and accidental death benefits in such policies. Section 36.001 provides that the Commissioner may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

The following statutes are affected by this proposal: Insurance Code Article 3.28

§3.9401. Purpose.

The purpose of this subchapter is to recognize and permit the use of mortality tables that reflect differences in mortality between preferred and standard lives in determining minimum reserve liabilities in accordance with Insurance Code Article 3.28, §3(a)(iii) and §3.4505 of this title (relating to General Calculation Requirements for Basic Reserves and Premium Deficiency Reserves).

§3.9402. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) 2001 CSO Mortality Table--Mortality tables, consisting of separate rates of mortality for male and female lives, developed by the American Academy of Actuaries CSO Task Force from the Valuation Basic Mortality Table developed by the Society of Actuaries Individual Life Insurance Valuation Mortality Task Force, and adopted by the NAIC in December 2002. The 2001 CSO Mortality Table is included in the Proceedings of the NAIC (2nd Quarter 2002) and supplemented by the 2001 CSO Preferred Class Structure Mortality Table defined below. Unless the context indicates otherwise, the 2001 CSO Mortality Table includes both the ultimate form of that table and the select and ultimate form of that table and includes both the smoker and nonsmoker mortality tables and the composite mortality tables. It also includes both the age-nearest-birthday and age-last-birthday bases of the mortality tables. Mortality tables in the 2001 CSO Mortality Table include the following:

(A) 2001 CSO Mortality Table (F)--Mortality table consisting of the rates of mortality for female lives from the 2001 CSO Mortality Table.

(B) 2001 CSO Mortality Table (M)--Mortality table consisting of the rates of mortality for male lives from the 2001 CSO Mortality Table.

(C) Composite mortality tables--Mortality tables with rates of mortality that do not distinguish between smokers and nonsmokers.

(D) Smoker and nonsmoker mortality tables--Mortality tables with separate rates of mortality for smokers and nonsmokers.

(2) 2001 CSO Preferred Class Structure Mortality Table--Mortality tables with separate rates of mortality for super preferred nonsmokers, preferred nonsmokers, residual standard nonsmokers, preferred smokers, and residual standard smoker splits of the 2001 CSO Nonsmoker and Smoker tables as adopted by the NAIC at the

September 2006 national meeting and published in the Proceedings of the NAIC (3rd Quarter 2006). Unless the context indicates otherwise, the 2001 CSO Preferred Class Structure Mortality Table includes both the ultimate form of that table and the select and ultimate form of that table. It includes both the smoker and nonsmoker mortality tables. It includes both the male and female mortality tables and the gender composite mortality tables. It also includes both the age-nearest-birthday and age-last-birthday bases of the mortality table.

(3) Statistical agent--An entity with proven systems for protecting the confidentiality of individual insured and insurer information, demonstrated resources for and history of ongoing electronic communications and data transfer ensuring data integrity with insurers, which are its members or subscribers, and a history of and means for aggregation of data and accurate promulgation of the experience modifications in a timely manner.

§3.9403. 2001 CSO Preferred Class Structure Table.

(a) At the election of the insurer, for each calendar year of issue, for any one or more specified plans of insurance and subject to satisfying the conditions stated in this subchapter, the 2001 CSO Preferred Class Structure Mortality Table may be substituted in place of the 2001 CSO Smoker or Nonsmoker Mortality Table as the minimum valuation standard for policies issued on or after January 1, 2007. No such election shall be made until the insurer demonstrates that at least 20 percent of the business to be valued on this table is in one or more of the preferred classes. A table from the 2001 CSO Preferred Class Structure Mortality Table used in place of a 2001 CSO Mortality Table, pursuant to the requirements of this subchapter, will be treated as part of the 2001 CSO Mortality Table only for purposes of reserve valuation pursuant to the requirements of §§3.9101 - 3.9106 of this title (relating to 2001 CSO Mortality Table).

(b) The Commissioner of Insurance adopts by reference the 2001 CSO Preferred Class Structure Mortality Table. The table is available from the Actuarial Division, Texas Department of Insurance, Mail Code 302-3A, 333 Guadalupe, Austin, Texas 78701 or on the internet by accessing the Department's website at www.tdi.state.tx.us/company/ficso.html.

§3.9404. Conditions.

(a) For each plan of insurance with separate rates for preferred and standard nonsmoker lives, an insurer may use the super preferred nonsmoker, preferred nonsmoker, and residual standard nonsmoker tables to substitute for the nonsmoker mortality table found in the 2001 CSO Mortality Table to determine minimum reserves. At the time of election and annually thereafter, except for business valued under the residual standard nonsmoker table, the appointed actuary shall certify that:

(1) the present value of death benefits over the next ten years after the valuation date, using the anticipated mortality experience without recognition of mortality improvement beyond the valuation date for each class, is less than the present value of death benefits using the valuation basic table corresponding to the valuation table being used for that class; and

(2) the present value of death benefits over the future life of the contracts, using anticipated mortality experience without recognition of mortality improvement beyond the valuation date for each class, is less than the present value of death benefits using the valuation basic table corresponding to the valuation table being used for that class.

(b) For each plan of insurance with separate rates for preferred and standard smoker lives, an insurer may use the preferred smoker and residual standard smoker tables to substitute for the smoker mortality table found in the 2001 CSO Mortality Table to determine minimum reserves. At the time of election and annually thereafter, for business valued under the preferred smoker table, the appointed actuary shall certify that:

(1) the present value of death benefits over the next ten years after the valuation date, using the anticipated mortality experience without recognition of mortality improvement beyond the valuation date for each class, is less than the present value of death benefits using the preferred smoker valuation basic table; and

(2) the present value of death benefits over the future life of the contracts, using anticipated mortality experience without recognition of mortality improvement beyond the valuation date for each class, is less than the present value of death benefits using the preferred smoker valuation basic table.

(c) Unless exempted by the commissioner, every insurer using the 2001 CSO Preferred Class Structure Table shall annually file with the commissioner, with the NAIC, or with a statistical agent designated by the NAIC and acceptable to the commissioner, statistical reports showing mortality and such other information as the commissioner may deem necessary or expedient for the administration of the provisions of this regulation. The form of the reports shall be established by the commissioner, or the commissioner may require the use of a form established by the NAIC or by a statistical agent designated by the NAIC and acceptable to the commissioner. The form of the statistical reports shall be promulgated by rule. Insurers are not required to file such statistical reports until such rule has been adopted by the commissioner. At the commissioner' discretion, the commissioner may request mortality and other information at any time.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 20, 2006.

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Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: February 4, 2007
For further information, please call: (512) 463-6327

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CHAPTER 5. PROPERTY AND CASUALTY INSURANCE

The Texas Department of Insurance proposes amendments to §5.4010 and new §5.4011 concerning building code specifications in the plan of operation of the Texas Windstorm Insurance Association (Association) for structures to be eligible for windstorm and hail insurance coverage through the Association and proposes amendments to §5.4603 which adopts by reference the forms to be used for windstorm inspections to determine compliance with applicable building code requirements in the plan of operation of the Association. The proposed amendments to §5.4010(a), (a)(2), and (a)(3) are necessary to specify the end date of August 31, 2007, for compliance with the 2003 editions of the International Residential Code (IRC) and the International Building Code (IBC) with Texas Revisions, which are adopted by reference in the current §5.4010. The IRC specifies building

code standards for residential structures; and the IBC specifies building code standards for other structures, including commercial buildings and government buildings. The adoption by reference of the 2006 editions of the IRC and the IBC, as revised by 2006 Texas Revisions, is proposed in new §5.4011 to be effective September 1, 2007. Article 21.49 §3(f) and §6A(a) of the Insurance Code require that all structures that are constructed or repaired or to which additions are made on or after January 1, 1988, to be considered insurable property for windstorm and hail insurance from the Association, must be inspected or approved by the Commissioner for compliance with the building specifications in the plan of operation. Insurance Code, Article 21.49 §5(c) authorizes the amendment of the Association's plan of operation; and §6A(a) provides that after January 1, 2004, for geographic areas specified by the Commissioner, the Commissioner by rule shall adopt the 2003 International Residential Code for one and two-family dwellings published by the International Code Council and may adopt a subsequent edition of that code and any supplements published by the International Code Council and amendments to the code.

An amendment is also proposed to §5.4010(a)(2) to correct a cross reference.

New §5.4011(a) proposes the adoption by reference of the 2006 editions of the IRC and the IBC, as revised by the 2006 Texas Revisions, to be effective September 1, 2007. The adoption of the latest editions of the IRC and IBC is necessary to promulgate the most current wind load technology and construction standards for structures in the designated catastrophe areas to be eligible for windstorm insurance through the Association. This proposal was recommended on July 12, 2006, by the Windstorm Building Code Advisory Committee on Specifications and Maintenance (BCAC) pursuant to the Insurance Code, Article 21.49, §6C, with the exception of a change in the designated catastrophe areas to which proposed §R325 in the 2006 edition of the IRC and proposed §1716 of the 2006 edition of the IBC apply.

Both §R325 of the IRC and §1716 of the IBC set standards for corrosion resistant fasteners and metal connectors. The BCAC recommended these two standards for structures, including all open structural spaces and vented or enclosed areas and heated and cooled living spaces, in those designated catastrophe areas seaward of the Intracoastal Canal and catastrophe areas inland of the Intracoastal Canal and within 25 miles of the Texas coastline, but not for structures located in catastrophe areas inland and west of the specified boundary line in the designated catastrophe areas. In addition to the BCAC recommendation, this proposal also applies §R325 and §1716 to all open spaces of structures located inland and west of the specified boundary line in the designated catastrophe areas. Structural open areas include porches, decks, carports, exterior wall coverings, roof coverings, metal ties for stone and masonry veneer, underside of elevated structures, anchors for securing mechanical equipment, garage door attachments, roof vent attachments, skylight attachments, and impact protective systems (shutters). Therefore, the proposed new section will provide standards for corrosion resistant fasteners and metal connectors used in open areas of structures located in designated catastrophe areas inland and west of the specified boundary line in the designated catastrophe areas, but will not require corrosion resistant fasteners in vented or enclosed areas, or in heated and cooled living areas in these structures, unless otherwise specified in the IRC or IBC.

Subsection (a)(1) - (3) of §5.4010 provides the wind resistance standards for structures built seaward of the Intracoastal Canal, inland of the Intracoastal Canal and within approximately 25 miles of the Texas coastline and east of the specified boundary line and certain areas in Harris County, and areas inland and west of the specified boundary line, respectively. These wind resistance standards conform to the 2003 IRC and IBC. The proposed amendments to the subsection specify the end date for the wind resistance standards for the 2003 IRC and IBC to be September 1, 2007.

Proposed subsection (a)(1) - (3) of §5.4011 provides the wind resistance standards for structures built seaward of the Intracoastal Canal, inland of the Intracoastal Canal and within approximately 25 miles of the Texas coastline and east of the specified boundary line and certain areas in Harris County, and areas inland and west of the specified boundary line, respectively. The wind resistance requirements conform to the 2006 IRC and IBC.

Proposed subsection (b) of §5.4011 provides an exemption from §5.4011(a) for repairs, alterations, and additions necessary for the preservation, restoration, rehabilitation, or continued use of a historic structure. Subsection (b)(1) - (3) defines the attributes that make a structure a historic structure.

The proposed amendments to §5.4603(a) are necessary to modify Forms WPI-2-BC-1, WPI-2-BC-2, WPI-2-BC-3, and WPI-2-BC-4, which are inspection verification forms pertaining to projects commencing construction at various times in the past, to include a space to list other as a description of a building modification not otherwise specified in the printed checklist of the forms; to modify Forms WPI-2-BC-2, WPI-2-BC-3, and WPI-2-BC-4 to include verification of exposure category used to define the design conditions for a building or structure; to provide an end date on Inspection Verification Form WPI-2-BC-4 for projects that commenced construction between January 1, 2005 and August 31, 2007; to adopt by reference new Form WPI-2-BC-5, a windstorm inspection verification form that will be used to document an inspection of a project that commenced construction on or after September 1 2007; to update the Design Certification Form WPI-2D to apply to projects that will commence construction on or after September 1, 2007; and to renumber the references in §5.4603(a) because of the addition of the new form.

Alexis Dick, Deputy Commissioner, Inspections Division, has determined that, for each year of the first five years the proposed amendments and new section will be in effect, there will be no fiscal impact to state and local governments as a result of the enforcement or administration of the proposal; and there will be no measurable effect on local employment or the local economy as a result of the proposal.

Ms. Dick also has determined that, for each year of the first five years the proposed amendments and new section are in effect, there are various public benefits anticipated as a result of the proposed amendments and the new section. The proposed amendments to §5.4010 provide a specific end date for compliance with the 2003 International Residential Code (IRC) and International Building Code (IBC) as revised by the 2003 Texas Revisions. This will give architects, engineers, manufacturers, and the building construction industry sufficient notice and ample time to prepare for the transition to the 2006 IRC and IBC, as revised by the 2006 Texas Revisions.

The anticipated public benefit from the adoption in new §5.4011(a) of the 2006 edition of the IRC and IBC, as revised by the 2006 Texas Revisions, will be the design and construction of structures in the designated catastrophe area that are con-

structed, repaired, or to which additions are made on and after September 1, 2007, that meet the most current construction standards and use the most current wind load technology in order to be eligible for windstorm insurance through the Association. This, in turn, will result in the mitigation of property damage and resulting human suffering in the designated catastrophe area in the event of a major hurricane. The 2006 edition references the most recent American Society of Civil Engineers standard, known as the ASCE 7-05, which is used by architects, engineers, and structural designers throughout the construction industry nationwide. The 2006 edition of the IRC and the IBC will provide guidance and clarification for construction in the designated catastrophe areas, and when properly employed, will result in consistency and uniformity in the design, construction, and inspection of residences and businesses participating in the windstorm inspection process. Section 5.4011(b)(1) - (3), governing the exemption of historic structures, is also in the 2003 IRC and IBC; therefore, there is no additional cost for compliance as a result of this proposal.

No individual or entity is required to comply with the proposed new section because only those structures that are insured through the Association are required to comply with the new standards. However, in many areas of the designated catastrophe areas of the Texas sea coast, voluntary wind insurance is difficult to obtain, leaving many property owners with no option other than to insure through the Association.

The Department anticipates that the costs resulting from the proposed change from the current 2003 editions of the IRC and the IBC, as revised by the 2003 Texas Revisions, to the 2006 editions of the IRC and the IBC, as revised by the 2006 Texas Revisions, will be minimal. The 2006 editions of the IRC and the IBC do not have any major changes in building code policy or standards from those in the 2003 editions of the IRC and the IBC. Generally, as one standardized building code replaces another, costs are absorbed as part of the natural progression nationwide by the construction industry to adapt to the most recent standardized code, which is the 2006 edition of the IRC and IBC. Any residual costs may be offset by greater efficiencies created by technological changes in the manufacture and assemblage of building components, improved construction methods, and other standardization and modernization measures within the building industry. Additionally, any costs to builders to comply with the international standardized building code in windstorm-affected areas in Texas, not otherwise absorbed result from the enactment of SB 14 by the 78th Legislature, Regular Session, chap. 206, effective June 11, 2003 which provides in relevant part that the Commissioner of Insurance by rule shall adopt the 2003 International Residential Code for one and two-family dwellings in geographic areas specified by the Commissioner and may adopt by rule any subsequent edition of that code and supplements and amendments.

The anticipated public benefit from the proposed amendments to §5.4603(a) will be the availability of appropriate forms for use in windstorm inspections to document compliance with the new building standards. This will help eliminate unnecessary confusion for appointed Texas licensed engineers and builders who use the new building standards. Because the forms are available from the website of the Inspections Division and are typically downloaded by engineers and others who use them on an as-needed basis, there will be no additional costs to print the new forms. The Department does not anticipate any increased cost in the use of the proposed forms as compared to the current forms.

The Department anticipates that the proposed amendment and new section will not have an adverse impact on small and micro businesses. The Department has considered the purpose of the applicable statute and the proposed amendments and new section and has determined that it is not necessary, reasonable, legal, or feasible to waive or modify the proposed requirements for small or micro businesses who opt to comply with the new building standards and inspection process in order to obtain windstorm coverage through the Association.

To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on February 5, 2007, to Gene Jarmon, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comment must be simultaneously submitted to Alexis Dick, Deputy Commissioner, Inspections Division, MC 103-1A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104.

The Commissioner will consider the adoption of amendments to §5.4010 and §5.4603 and proposed new §5.4011 in a public hearing under Docket Number 2663, scheduled for 10:00 a.m. on February 13, 2007 in Room 100 of the William P. Hobby, Jr. State Office Building, 333 Guadalupe Street, Austin, Texas. Written and oral comments presented at the hearing will be considered.

SUBCHAPTER E. TEXAS WINDSTORM INSURANCE ASSOCIATION

DIVISION 1. PLAN OF OPERATION

28 TAC §5.4010, §5.4011

The amendments and new section are proposed under the Insurance Code Article 21.49 and §36.001. Article 21.49 §5(c) provides that the Commissioner of Insurance by rule shall adopt the Association's plan of operation and any changes to the plan of operation. Article 21.49, §3(f) and §6A(a) require that all structures that are constructed or repaired or to which additions are made on or after January 1, 1988, to be considered insurable property for windstorm and hail insurance from the Association, must be inspected or approved by the Commissioner for compliance with the building specifications in the plan of operation. Article 21.49 §6A(a) also requires, for geographic areas specified by the Commissioner, the Commissioner to adopt by rule the 2003 International Residential Code for one and two-family dwellings published by the International Code Council. Section 6A(a) further provides that, for those geographic areas specified by the Commissioner, the Commissioner by rule may adopt a subsequent edition of that code and may adopt any supplements published by the International Code Council and amendments to the code. Article 21.49, §6C(b) establishes a Windstorm Building Code Advisory Committee on Specifications and Maintenance to advise and make recommendations to the Commissioner on building requirements and maintenance in the Association's plan of operation. Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

The following article is affected by this proposal: Insurance Code, Article 21.49.

§5.4010. Applicable Building Code Standards in Designated Catastrophe Areas for Structures Constructed, Repaired or to Which Additions Are Made On and After January 1, 2005, and before September 1, 2007.

(a) To be eligible for catastrophe property insurance, structures located in the designated catastrophe areas specified in §5.4008 of this chapter (relating to Applicable Building Code Standards in Designated Catastrophe Areas for Structures Constructed, Repaired or to Which Additions Are Made On and After September 1, 1998, and before February 1, 2003) and which are constructed, repaired, or to which additions are made on and after January 1, 2005, and before September 1, 2007, shall comply with the 2003 Editions of the International Residential Code and the International Building Code, as each is revised by the 2003 Texas Revisions, and all of which are adopted by reference to be effective January 1, 2005. The codes are published by and available from the International Code Council, Publications, 4051 West Flossmoor Road, Country Club Hills, Illinois, 60478-5795, (Telephone: 888-422-7233), and the 2003 Texas Revisions to the 2003 Edition of the International Residential Code and the 2003 Texas Revisions to the 2003 Edition of the International Building Code are available from the Windstorm Inspections Section of the Inspections Division, Texas Department of Insurance, 333 Guadalupe, P.O. Box 149104, MC 103-3A, Austin, Texas, 78714-9104 and the Texas Department of Insurance website at www.tdi.state.tx.us. The following wind speed requirements shall apply:

(1) Areas Seaward of the Intracoastal Canal. To be eligible for catastrophe property insurance, structures located in designated catastrophe areas which are seaward of the Intracoastal Canal and constructed, repaired, or to which additions are made on or after January 1, 2005, and before September 1, 2007, shall be designed and constructed to resist a 3-second gust of 130 miles per hour.

(2) Areas Inland of the Intracoastal Canal and Within Approximately 25 Miles of the Texas Coastline and east of the Specified Boundary Line and Certain Areas in Harris County. To be eligible for catastrophe property insurance, structures located in designated catastrophe areas specified in subsection [~~subsections~~] (b)(2)(A) and (B) [~~(b)(2)(B)~~] of §5.4008 of this chapter and constructed, repaired, or to which additions are made on or after January 1, 2005, and before September 1, 2007, shall be designed and constructed to resist a 3-second gust of 120 miles per hour.

(3) Areas Inland and West of the Specified Boundary Line. To be eligible for catastrophe property insurance, structures located in designated catastrophe areas specified in subsection (c) of §5.4008 of this chapter and constructed, repaired, or to which additions are made on or after January 1, 2005, and before September 1, 2007, shall be designed and constructed to resist a 3-second gust of 110 miles per hour.

(b) (No change.)

§5.4011. Applicable Building Code Standards in Designated Catastrophe Areas for Structures Constructed, Repaired or to Which Additions Are Made On and After September 1, 2007.

(a) To be eligible for catastrophe property insurance, structures located in the designated catastrophe areas specified in §5.4008 of this chapter (relating to Applicable Building Code Standards in Designated Catastrophe Areas for Structures Constructed, Repaired or to Which Additions Are Made On and After September 1, 1998, and before February 1, 2003) and which are constructed, repaired, or to which additions are made on and after September 1, 2007, shall comply with the 2006 Editions of the International Residential Code and the International Building Code, as each is revised by the 2006 Texas Revisions, and all of which are adopted by reference to be effective September 1, 2007. The codes are published by and available from the International Code Council, Publications, 4051 West Flossmoor Road, Country Club Hills, Illinois, 60478-5795, (Telephone: 888-422-7233), and the 2006 Texas Revisions to the 2006 Edition of the International Residential Code and the 2006 Texas Revisions to the 2006 Edition of the International Building Code are available from the Windstorm Inspections Section of the Inspections Division, Texas Department of Insurance, 333 Guadalupe, P.O. Box 149104, MC 103-3A, Austin, Texas, 78714-9104 and on the Texas Department of Insurance website at www.tdi.state.tx.us. The following wind speed requirements shall apply:

(1) Areas Seaward of the Intracoastal Canal. To be eligible for catastrophe property insurance, structures located in designated catastrophe areas which are seaward of the Intracoastal Canal and constructed, repaired, or to which additions are made on or after September 1, 2007, shall be designed and constructed to resist a 3-second gust of 130 miles per hour.

(2) Areas Inland of the Intracoastal Canal and Within Approximately 25 Miles of the Texas Coastline and East of the Specified Boundary Line and Certain Areas in Harris County. To be eligible for catastrophe property insurance, structures located in designated catastrophe areas specified in subsection (b)(2)(A) and (B) of §5.4008 of this chapter and constructed, repaired, or to which additions are made on or after September 1, 2007, shall be designed and constructed to resist a 3-second gust of 120 miles per hour.

(3) Areas Inland and West of the Specified Boundary Line. To be eligible for catastrophe property insurance, structures located in designated catastrophe areas specified in subsection (c) of §5.4008 of this chapter and constructed, repaired, or to which additions are made on or after September 1, 2007, shall be designed and constructed to resist a 3-second gust of 110 miles per hour.

(b) Repairs, alterations and additions necessary for the preservation, restoration, rehabilitation, or continued use of a historic structure may be made without conformance to the requirements of subsection (a) of this section. In order for a historic structure to be exempted, at least one of the following conditions shall apply to the structure:

(1) The structure is listed or is eligible for listing on the National Register of Historic places.

(2) The structure is a Recorded Texas Historic Landmark (RTHL).

(3) The structure has been specifically designated by official action of a legally constituted municipal or county authority as having special historical or architectural significance, is at least 50 years old and is subject to the municipal or county requirements relative to construction, alteration, or repair of the structure, in order to maintain its historical designation.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 19, 2006.

TRD-200606835
Gene Jarmon
Chief Clerk and General Counsel
Texas Department of Insurance
Earliest possible date of adoption: February 4, 2007
For further information, please call: (512) 463-6327

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DIVISION 7. INSPECTIONS FOR WINDSTORM AND HAIL INSURANCE

28 TAC §5.4603

The amendments and new section are proposed under the Insurance Code Article, 21.49 and §36.001. Article 21.49, §5(c) provides that the Commissioner of Insurance by rule shall adopt the Association's plan of operation and any changes to the plan of operation. Article 21.49, §3(f) and §6A(a) require that all structures that are constructed or repaired or to which additions are made on or after January 1, 1988, to be considered insurable property for windstorm and hail insurance from the Association, must be inspected or approved by the Commissioner for compliance with the building specifications in the plan of operation. Article 21.49, §6A(a) also requires, for geographic areas specified by the Commissioner, the Commissioner to adopt by rule the 2003 International Residential Code for one and two-family dwellings published by the International Code Council. Section 6A(a) further provides that, for those geographic areas specified by the Commissioner, the Commissioner by rule may adopt a subsequent edition of that code and may adopt any supplements published by the International Code Council and amendments to the code. Article 21.49, §6C(b) establishes a Windstorm Building Code Advisory Committee on Specifications and Maintenance to advise and make recommendations to the Commissioner on building requirements and maintenance in the Association's plan of operation. Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

§5.4603. Forms for Windstorm Inspections.

(a) The Texas Department of Insurance adopts by reference the following forms for use in windstorm inspection:

(1) (No change.)

(2) Inspection Verification, Form WPI-2-BC-1, effective September 1, 2007 [~~January 1, 2005~~];

(3) Inspection Verification, Form WPI-2-BC-2, effective September 1, 2007 [~~January 1, 2005~~];

(4) Inspection Verification, Form WPI-2-BC-3, effective September 1, 2007 [~~January 1, 2005~~];

(5) Inspection Verification, Form WPI-2-BC-4, effective September 1, 2007 [~~January 1, 2005~~];

(6) Inspection Verification, Form WPI-2-BC-5, effective September 1, 2007;

(7) [~~(6)~~] Design Certification, Form WPI-2D, effective September 1, 2007 [~~January 1, 2005~~];

(8) [~~(7)~~] Field Form, Form WPI-7, effective January 1, 2005;

(9) [~~(8)~~] Certificate of Compliance, Form WPI-8, as amended October 1, 1998.

(b) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 19, 2006.

TRD-200606836

Gene Jarmon
Chief Clerk and General Counsel
Texas Department of Insurance
Earliest possible date of adoption: February 4, 2007
For further information, please call: (512) 463-6327

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 7. TEXAS COMMISSION ON LAW ENFORCEMENT OFFICER STANDARDS AND EDUCATION

CHAPTER 211. ADMINISTRATION

37 TAC §211.1

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes an amendment to Title 37, Texas Administrative Code §211.1, concerning Definitions. An amendment to add new subsection (a)(32) "honorable discharge" for clarification and consistency. Subsection (b) is amended to reflect the effective date for these changes.

The Commission has determined that for each year of the first five years the amendment as proposed will be in effect there will not be fiscal implications to state or local governments as a result of administering the amendment.

The Commission has determined that for each year of the first five years the amendment as proposed will be in effect there will be no anticipated economic cost to large, small, or micro businesses as a result of the proposed amendment. There will be no cost to individuals who are required to comply with the rule as proposed.

The Commission has determined that for each year of the first five years the amendment as proposed will be in effect, there will be a positive benefit to the public by adding the definition" honorable discharge" to assist academies and agencies to determine what the Commission will accept in regards to conditions of discharge on a DD214.

Comments may be submitted in writing to Mr. Timothy A. Braaten, Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 Highway 290 East, Suite 200, Austin, TX 78723.

The amendment is proposed under Texas Occupations Code, Chapter 1701, §1701.151 General Powers which authorized the Commission to promulgate rules for administration of this chapter.

The rule amendment as proposed is in compliance with Texas Occupations Code §1701.001, Definitions.

No other code, article, or statute is affected by this proposal.

§211.1. Definitions.

(a) The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) - (31) (No change.)

(32) Honorable conditions--a discharge from the armed forces of the United States after at least two (2) years active duty

service characterized as Honorable or General - Under Honorable Conditions.

(33) [~~(32)~~] Individual--A human being who has been born and is or was alive.

(34) [~~(33)~~] Jailer--A person employed or appointed as a jailer under the provisions of the Local Government Code, §85.005, or Government Code §511.092.

(35) [~~(34)~~] Killed in the line of duty--A Texas peace officer killed as a directly attributed result of a personal injury sustained in the line of duty.

(36) [~~(35)~~] Law--Including, but not limited to, the constitution or a statute of this state, or the United States; a written opinion of a court of record; a municipal ordinance; an order of a county commissioners' court; or a rule authorized by and lawfully adopted under a statute.

(37) [~~(36)~~] Law enforcement academy--A school operated by a governmental entity that has been licensed by the commission, which may provide basic licensing courses and continuing education.

(38) [~~(37)~~] Law enforcement automobile for training--A vehicle equipped to meet the requirements of an authorized emergency vehicle as identified by Transportation Code Secs. 546.003 and 547.702.

(39) [~~(38)~~] Lesson plan--Detailed guides from which an instructor teaches. The plan includes the goals, specific content and subject matter, performance or learning objectives, references, resources, and method of evaluating or testing students.

(40) [~~(39)~~] License--A license, certificate, registration, permit, or other form of authorization required by law or a state agency rule that must be obtained by an individual to engage in a particular business.

(41) [~~(40)~~] Licensee--An individual holding a license issued by the commission.

(42) [~~(41)~~] Line of duty--Any lawful and reasonable action, which a Texas peace officer is required or authorized by rule, condition of employment, or law to perform. The term includes an action by the individual at a social, ceremonial, athletic, or other function to which the individual is assigned by the individual's employer.

(43) [~~(42)~~] Moral character--The propensity on the part of a person to serve the public of the state in a fair, honest, and open manner.

(44) [~~(43)~~] Officer--A peace officer or reserve.

(45) [~~(44)~~] Patrol rifle--Any magazine-fed repeating rifle with iron/open sights or with a frame mounted optical enhancing sighting device, 3 power or less, that is carried by the individual officer in an official capacity.

(46) [~~(45)~~] Peace officer--A person elected, employed, or appointed as a peace officer under the Code of Criminal Procedure, Article 2.12, or under other statute.

(47) [~~(46)~~] Placed on probation--Has received an adjudicated, unadjudicated or deferred adjudication probation for a criminal offense.

(48) [~~(47)~~] POST--State or federal agency with jurisdiction similar to that of the commission, such as a peace officer standards and training agency.

(49) [~~(48)~~] Precision rifle--Any rifle with a frame mounted optical sighting device greater than 3 power that is carried by the individual officer in an official capacity.

(50) [~~(49)~~] Proprietary training contractor--An approved training contractor operated for a profit.

(51) [~~(50)~~] Public security officer--A person employed or appointed as an armed security officer by this state or a political subdivision of this state. The term does not include a security officer employed by a private security company that contracts with this state or a political subdivision of this state to provide security services for the entity.

(52) [~~(51)~~] Reactivate--To make a license issued by the commission active after at least a two-year break in service.

(53) [~~(52)~~] Resigned/Terminated--an explanation of the circumstances under which the individual resigned (retired, honorably discharged), was terminated (dishonorably discharged, generally discharged), or other (killed in the line of duty, died, or disabled) in accordance with §1701.452.

(54) [~~(53)~~] Reinstate--To make a license issued by the commission active after disciplinary action or after expiration of a license due to failure to obtain required continuing education.

(55) [~~(54)~~] Renew--Continuation of an active license issued by the commission.

(56) [~~(55)~~] Reserve--A person appointed as a reserve law enforcement officer under the provisions of the Local Government Code, §85.004, §86.012 or §341.012.

(57) [~~(56)~~] Self-assessment--Completion of the commission created process, which gathers information about a training or education program.

(58) [~~(57)~~] SOAH--The State Office of Administrative Hearings.

(59) [~~(58)~~] Successful completion--A result of:

(A) 70 percent or better; or

(B) C or better; or

(C) pass, if offered as pass/fail.

(60) [~~(59)~~] Telecommunicator--A dispatcher or other emergency communications specialist appointed under or governed by the provisions of the Occupations Code, Chapter 1701.

(61) [~~(60)~~] Texas peace officer--For the purposes of eligibility for the Texas Peace Officers' Memorial, an individual who had been elected, employed, or appointed as a peace officer under Texas law; an individual appointed under Texas law as a reserve peace officer, a commissioned deputy game warden, or a corrections officer in a municipal, county, or state penal institution, a federal law enforcement officer or special agent performing duties in this state, including those officers under Article 2.122, Code of Criminal Procedure, or any other officer authorized by Texas law.

(62) [~~(61)~~] Training coordinator--An individual, appointed by a commission-recognized training provider, who meets the requirements of §215.9.

(63) [~~(62)~~] Training cycle--A 48-month period as established by the Commission. Each training cycle is composed of two contiguous 24-month units.

(64) [~~(63)~~] Training hours--Actual classroom or distance education hours.

(65) [~~(64)~~] Training program--An organized collection of various resources recognized by the commission for providing preparatory or continuing training. This program includes, but is not limited to, learning goals and objectives, academic activities and exercises, lesson plans, exams, skills training, skill assessments, instructional and learning tools, and training requirements.

(66) [~~(65)~~] Training provider--A governmental body, law enforcement association, alternative delivery trainer, or proprietary entity credentialed by the commission to provide preparatory or continuing training for licensees or potential licensees.

(67) [~~(66)~~] Verification (verified)--The confirmation of the correctness, truth, or authenticity of a document, report, or information by sworn affidavit, oath, or deposition.

(b) The effective date of this section is June 1, 2007. [~~June 1, 2006.~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 18, 2006.

TRD-200606806
Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Earliest possible date of adoption: February 4, 2007
For further information, please call: (512) 936-7717

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CHAPTER 215. TRAINING AND EDUCATIONAL PROVIDERS AND RELATED MATTERS

37 TAC §215.13

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes an amendment to Title 37, Texas Administrative Code, §215.13, concerning Risk Assessment. Subsection (a)(1) - (3), (b)(1), and (c)(1) is changed to use only the first attempt pass rate as an indicator of at risk status and to increase the first attempt pass rate to 80 percent. Subsection (f) is amended to reflect the effective date for these changes.

The Commission has determined that for each year of the first five years the amendment as proposed will be in effect there will not be fiscal implications to state or local governments as a result of administering the amendment.

The Commission has determined that for each year of the first five years the amendment as proposed will be in effect there will be no anticipated economic cost to large, small, or micro businesses as a result of the proposed amendment. There will be no cost to individuals who are required to comply with the rule as proposed.

The Commission has determined that for each year of the first five years the amendment as proposed will be in effect there will be a positive benefit to law enforcement contractual training providers. Contractual training providers are required by the §215.1 to renew their training contract every two (2) years. This rule change brings contractual training provider in line with law enforcement academies and academic alternative program for contract renewals and reduces time manpower required for two-year renewals.

Comments may be submitted in writing to Mr. Timothy A. Braaten, Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 Highway 290 East, Suite 200, Austin, TX 78723.

The amendment is proposed under Texas Occupations Code, Chapter 1701, §1701.151, General Powers, which authorized the Commission to promulgate rules for administration of this chapter.

The rule amendment as proposed is in compliance with Texas Occupations Code §1701.254, Risk Assessment and inspections.

No other code, article, or statute is affected by this proposal.

§215.13. Risk Assessment.

(a) A law enforcement academy may be found at risk;

(1) after January 1, 2003, if the passing rate on a licensing examination for first attempts for any state fiscal year is less than 70 percent of the students attempting the licensing exam; [~~completing an academy;~~]

(2) after September 1, 2009, if the passing rate on a licensing exam for first attempts for any three consecutive state fiscal years, beginning with state fiscal year 2007 (September 1, 2006 through August 31, 2007) is less than 80 percent of the students attempting the licensing exam;

[~~(2) if the passing rate on a licensing examination for all attempts for any state fiscal year is less than 70 percent of the students completing an academy;~~]

[~~(3) after January 1, 2005, if the passing rate on a licensing examination for all attempts for any state fiscal year is less than 80 percent of the students completing an academy;~~]

(3) [~~(4)~~] if commission required learning objectives are not taught;

(4) [~~(5)~~] if lesson plans for classes conducted are not on file;

(5) [~~(6)~~] if examination and other evaluative scoring documentation is not on file;

(6) [~~(7)~~] if the academy files false reports to the commission;

(7) [~~(8)~~] if the academy makes repeated errors in reporting;

(8) [~~(9)~~] if the academy does not respond to commission requests for information;

(9) [~~(10)~~] if the academy does not comply with commission rules or other applicable law;

(10) [~~(11)~~] if the academy does not achieve the goals identified in its application for a license;

(11) [~~(12)~~] if the academy does not meet the needs of the officers and law enforcement agencies served; or

(12) [~~(13)~~] if the commission has received sustained complaints or evaluations from students or the law enforcement community concerning the quality of training or failure to meet training needs for the service area.

(b) A contractual provider may be found at risk;

(1) for the same reasons in subsection (a)(1) and (2) [~~- (3)~~] if licensing courses or components are provided;

(2) - (10) (No change.)

(c) An academic provider may be found at risk:

(1) after January 1, 2003, if the passing rate on a licensing examination for first attempts for any 3 state fiscal year period is less than 70 percent of the students attempting the licensing exam;

[~~(1) for the same reasons in subsection (a)(1) - (3) for any 3-year period;~~]

(2) after September 1, 2009, if the passing rate on a licensing exam for first attempts for any three consecutive state fiscal years, beginning with state fiscal year 2007 (September 1, 2006 through August 31, 2007) is less than 80 percent of the students attempting the licensing exam;

(3) [~~(2)~~] if courses are not conducted in compliance with Higher Education Program Guidelines accepted by the commission;

(4) [~~(3)~~] if the commission required learning objectives are not taught;

(5) [~~(4)~~] if the program files false reports to the commission;

(6) [~~(5)~~] if the program makes repeated errors in reporting;

(7) [~~(6)~~] if the program does not respond to commission requests for information;

(8) [~~(7)~~] if the program does not comply with commission rules or other applicable law;

(9) [~~(8)~~] if the program does not achieve the goals identified in its application for a license or contract;

(10) [~~(9)~~] if the program does not meet the needs of the students and law enforcement agencies served; or

(11) [~~(10)~~] if the commission has received sustained complaints or evaluations from students or the law enforcement community concerning the quality of education or failure to meet education needs for the service area.

(d) - (e) (No change.)

(f) The effective date of this section is June 1, 2007. [~~June 1, 2004.~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 18, 2006.

TRD-200606808

Timothy A. Braaten

Executive Director

Texas Commission on Law Enforcement Officer Standards and Education

Earliest possible date of adoption: February 4, 2007

For further information, please call: (512) 936-7717

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37 TAC §215.15

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes an amendment to Title 37, Texas Administrative Code, §215.15, concerning Enrollment Standards and Training Credit. Subsection (b)(3) is changed to add persons with a general discharge under honorable conditions from the armed forces of the United States as eligible for enrollment in any basic peace officer training course. Subsection (d) is amended to reflect the effective date for these changes.

The Commission has determined that for each year of the first five years the amendment as proposed will be in effect there will not be fiscal implications to state or local governments as a result of administering the amendment.

The Commission has determined that for each year of the first five years the amendment as proposed will be in effect there will be no anticipated economic cost to large, small, or micro businesses as a result of the proposed amendment. There will be no cost to individuals who are required to comply with the rule as proposed.

The Commission has determined that for each year of the first five years the amendment as proposed will be in effect there will be a positive benefit to law enforcement academies and agencies to assist them in determining what the Commission will accept in regards to conditions of discharge on a DD214.

Comments may be submitted in writing to Mr. Timothy A. Braaten, Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 Highway 290 East, Suite 200, Austin, TX 78723.

The amendment is proposed under Texas Occupations Code, Chapter 1701, §1701.151, General Powers, which authorized the Commission to promulgate rules for administration of this chapter.

The rule amendment as proposed is in compliance with Texas Occupations Code §1701.255, Enrollment Qualifications.

No other code, article, or statute is affected by this proposal.

§215.15. Enrollment Standards and Training Credit.

(a) (No change.)

(b) In order for an individual to enroll in any basic peace officer training program that provides instruction in defensive tactics, arrest procedures, firearms, or use of a motor vehicle for law enforcement purposes, the academy must have on file:

(1) - (2) (No change.)

(3) an honorable discharge or general discharge under honorable conditions from the armed forces of the United States after at least 24 months of active duty service;

(c) (No change.)

(d) The effective date of this section is June 1, 2007. [~~June 1, 2006.~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 18, 2006.

TRD-200606809

Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Earliest possible date of adoption: February 4, 2007
For further information, please call: (512) 936-7717

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CHAPTER 217. LICENSING REQUIREMENTS

37 TAC §217.1

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes an amendment to Title 37, Texas Administrative Code, §217.1, concerning Minimum Standards for Initial Licensure. Subsection (a)(13) is changed to reflect the conditions of discharge from the armed forces of the United States that are eligible for initial licensure. Subsection (o) is amended to reflect the effective date for these changes.

The Commission has determined that for each year of the first five years the amendment as proposed will be in effect there will not be fiscal implications to state or local governments as a result of administering the amendment.

The Commission has determined that for each year of the first five years the amendment as proposed will be in effect there will be no anticipated economic cost to large, small, or micro businesses as a result of the proposed amendment. There will be no cost to individuals who are required to comply with the rule as proposed.

The Commission has determined that for each year of the first five years the amendment as proposed will be in effect there will be a positive benefit to law enforcement academies and agencies to assist them in determining what the Commission will accept in regards to conditions of discharge on a DD214.

Comments may be submitted in writing to Mr. Timothy A. Braaten, Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 Highway 290 East, Suite 200, Austin, TX 78723.

The amendment is proposed under Texas Occupations Code, Chapter 1701, §1701.151, General Powers, which authorized the Commission to promulgate rules for administration of this chapter.

The rule amendment as proposed is in compliance with Texas Occupations Code §1701.301, License Required.

No other code, article, or statute is affected by this proposal.

§217.1. Minimum Standards for Initial Licensure.

(a) The commission shall issue a peace officer, jailer, temporary jailer, or public security officer license to an applicant who meets the following standards:

(1) - (12) (No change.)

(13) has not been discharged from any military service under less than honorable conditions. [~~including, specifically;~~]

[~~(A) under other than honorable conditions;~~]

[~~(B) bad conduct;~~]

[~~(C) dishonorable; or~~]

[~~(D) any other characterization of service indicating bad character;~~]

(14) - (18) (No change.)

(b) - (n) (No change.)

(o) The effective date of this section is June 1, 2007. [~~June 1, 2006.~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 18, 2006.

TRD-200606810
Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Earliest possible date of adoption: February 4, 2007
For further information, please call: (512) 936-7717

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37 TAC §217.7

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes an amendment to Title 37, Texas Administrative Code, §217.7, concerning Reporting the Appointment and Termination of a Licensee. Subsection (g) is adding language by providing law enforcement agencies an option not to file a F-5 Report of Separation of Licensee to Commission, if the licensee has filed a grievance with an agency. This would allow all administrative remedies to be exhausted in the event the licensee is awarded full restoration of his time as a law enforcement officer. Subsection (i) is amended to reflect the effective date for these changes.

The Commission has determined that for each year of the first five years the amendment as proposed will be in effect there will not be fiscal implications to state or local governments as a result of administering the amendment.

The Commission has determined that for each year of the first five years the amendment as proposed will be in effect there will be no anticipated economic cost to large, small, or micro businesses as a result of the proposed amendment. There will be no cost to individuals who are required to comply with the rule as proposed.

The Commission has determined that for each year of the first five years the amendment as proposed will be in effect, there will be a positive benefit to the public by allowing law enforcement agencies to wait to file an F-5 Report of separation form until all administrative remedies are exhausted and thus prevent the filing of revised or amended termination reports. This rule change will benefit both licensee and law enforcement agencies by eliminating confusion for prospective employers viewing multiple F-5's being on file and cost for file retention.

Comments may be submitted in writing to Mr. Timothy A. Braaten, Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 Highway 290 East, Suite 200, Austin, TX 78723.

The amendment is proposed under Texas Occupations Code, Chapter 1701, §1701.151, General Powers, which authorized the Commission to promulgate rules for administration of this chapter.

The rule amendment as proposed is in compliance with Texas Occupations Code §1701.452, Employment Termination Report.

No other code, article, or statute is affected by this proposal.

§217.7. Reporting the Appointment and Termination of a Licensee.

(a) - (f) (No change.)

(g) When an individual licensed by the commission resigns from appointment or employment with an agency or if an individual's appointment or employment is terminated for any reason, the agency shall submit a report to the commission in the currently prescribed commission format that reports resignation or termination, including all emergency telecommunicators. The report shall be submitted within 30 days following the date of resignation or termination. If a licensee has filed a timely grievance or appeal within the personnel policies of the agency, the agency shall not be required to file the F-5 until all administrative remedies have been exhausted. The report shall include an explanation of the circumstances under which the individual resigned, was terminated, or other and one of the following designations: retired, honorably discharged, dishonorably discharged, generally discharged, killed in the line of duty, died, or disabled. The agency shall provide the individual who is the subject of the report a copy of the report. The individual may submit a petition to the commission to contest the information included in the report not later than the 30th day after they receive a copy of the report. They must also submit a copy of the petition to the law enforcement agency.

(h) (No change.)

(i) The effective date of this section is June 1, 2007. [~~June 1, 2006.~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 18, 2006.

TRD-200606811
Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Earliest possible date of adoption: February 4, 2007
For further information, please call: (512) 936-7717

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CHAPTER 223. ENFORCEMENT

37 TAC §223.19

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes an amendment to Title 37, Texas Administrative Code, §223.19, concerning Revocation of License. Subsection (e)(1) is changed to reflect the conditions of discharge from the armed forces of the United States that effect license revocation. Subsection (n) is amended to reflect the effective date for these changes.

The Commission has determined that for each year of the first five years the amendment as proposed will be in effect there will not be fiscal implications to state or local governments as a result of administering the amended section.

The Commission has determined that for each year of the first five years the amendment as proposed will be in effect there will be no anticipated economic cost to large, small, or micro businesses as a result of the proposed amendment. There will be no cost to individuals who are required to comply with the amendment as proposed.

The Commission has determined that for each year of the first five years the amendment as proposed will be in effect there will be a positive benefit to law enforcement academies and agencies to assist them in determining what the Commission will accept in regards to conditions of discharge on a DD214.

Comments may be submitted in writing to Timothy A. Braaten, Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 Highway 290 East, Suite 200, Austin, Texas 78723.

The amendment is proposed under Texas Occupations Code, Chapter 1701, §1701.151, General Powers, which authorizes the Commission to promulgate rules for administration of this chapter.

The rule amendment as proposed is in compliance with Texas Occupations Code, §1701.501, Disciplinary Action.

No other code, article, or statute is affected by this proposal.

§223.19. Revocation of License.

(a) - (d) (No change.)

(e) The commission shall revoke any license issued by the commission if the licensee:

(1) is or has been discharged from any military service under less than honorable conditions [~~including specifically:~~];

[~~(A) under other than honorable conditions;~~]

[~~(B) bad conduct;~~]

[~~(C) dishonorable; or~~]

[~~(D) any other characterization of service indicating bad character.~~]

(2) - (4) (No change.)

(f) - (m) (No change.)

(n) The effective date of this section is June 1, 2007 [~~March 1, 2001~~].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 18, 2006.

TRD-200606812
Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Earliest possible date of adoption: February 4, 2007
For further information, please call: (512) 936-7717

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37 TAC §223.20

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) proposes an amendment to Title 37, Texas Administrative Code, §223.20, concerning Revoca-

tion of License for Constitutionally Elected Officials. Subsection (e)(1) is changed to reflect the conditions of discharge from the armed forces of the United States that effect license revocation. Subsection (n) is amended to reflect the effective date for these changes.

The Commission has determined that for each year of the first five years the amendment as proposed will be in effect there will not be fiscal implications to state or local governments as a result of administering the amended section.

The Commission has determined that for each year of the first five years the amendment as proposed will be in effect there will be no anticipated economic cost to large, small, or micro businesses as a result of the proposed amendment. There will be no cost to individuals who are required to comply with the amendment as proposed.

The Commission has determined that for each year of the first five years the amendment as proposed will be in effect there will be a positive benefit to law enforcement academies and agencies to assist them in determining what the Commission will accept in regards to conditions of discharge on a DD214.

Comments may be submitted in writing to Timothy A. Braaten, Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, 6330 Highway 290 East, Suite 200, Austin, Texas 78723.

The amendment is proposed under Texas Occupations Code, Chapter 1701, §1701.151, General Powers, which authorizes the Commission to promulgate rules for administration of this chapter.

The amendment as proposed is in compliance with Texas Occupations Code, §1701.501, Disciplinary Action.

No other code, article, or statute is affected by this proposal.

§223.20. Revocation of License for Constitutionally Elected Officials.

(a) - (d) (No change.)

(e) The commission shall revoke any license issued by the commission if the licensee:

(1) is or has been discharged from any military service under less than honorable conditions [~~including specifically:~~];

[~~(A) under other than honorable conditions;~~]

[~~(B) bad conduct;~~]

[~~(C) dishonorable; or~~]

[~~(D) any other characterization of service indicating bad character.~~]

(2) - (4) (No change.)

(f) - (m) (No change.)

(n) The effective date of this section is June 1, 2007 [~~September 1, 2004~~].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 18, 2006.

TRD-200606813

Timothy A. Braaten

Executive Director

Texas Commission on Law Enforcement Officer Standards and Education

Earliest possible date of adoption: February 4, 2007

For further information, please call: (512) 936-7717

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WITHDRAWN RULES

Withdrawn Rules include proposed rules and emergency rules. A state agency may specify that a rule is withdrawn immediately or on a later date after filing the notice with the Texas Register. A proposed rule is withdrawn six months after the date of publication of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. Adopted rules may not be withdrawn. (Government Code, §2001.027)

TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 60. COMPLIANCE MONITORING RULES

10 TAC §§60.2 - 60.4, 60.6 - 60.13, 60.17, 60.18

The Texas Department of Housing and Community Affairs withdraws the proposed amendments to §§60.2 - 60.4, 60.6 - 60.13, 60.17, and 60.18 which appeared in the September 15, 2006, issue of the *Texas Register* (31 TexReg 7903).

Filed with the Office of the Secretary of State on December 22, 2006.

TRD-200606894
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Effective date: December 22, 2006
For further information, please call: (512) 475-4595

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TITLE 13. CULTURAL RESOURCES

PART 3. TEXAS COMMISSION ON THE ARTS

CHAPTER 31. AGENCY PROCEDURES

13 TAC §31.11

The Texas Commission on the Arts withdraws the emergency new §31.11 which appeared in the November 17, 2006, issue of the *Texas Register* (31 TexReg 9433).

Filed with the Office of the Secretary of State on December 21, 2006.

TRD-200606879
Ricardo Hernandez
Executive Director
Texas Commission on the Arts
Effective date: January 10, 2007
For further information, please call: (512) 936-6564

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ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the the rule (Government Code, §2001.036). If a rule is adopted without change to the text as published in the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 4. OFFICE OF THE SECRETARY OF STATE

CHAPTER 81. ELECTIONS

SUBCHAPTER D. VOTING SYSTEM CERTIFICATION

The Office of the Secretary of State, Elections Division, adopts the repeal of and new §81.60, concerning voting system certification procedures. The repeal is adopted without changes to the proposal as published in the September 8, 2006, issue of the *Texas Register* (31 TexReg 7207). The new section is adopted with changes and will be republished.

The repeal and new rule are adopted to incorporate the most recent requirements to certify voting systems.

Comments were received recommending slight modifications to the proposed rule, as follows:

Change the wording of "Independent Testing Authority" to "nationally accredited voting system test laboratory."

Clarify paragraph (8) to state the requirement for the applicant to demonstrate the installation and configuration of their voting system and components, rather than demonstrating a build of the system.

The Office of the Secretary of State agrees with the recommended comments and has made the changes accordingly.

1 TAC §81.60

The repeal is adopted under the Texas Election Code (the "Code"), Chapter 31, Subchapter A, §31.003, which provides the Office of the Secretary of State with the authority to obtain and maintain uniformity in the application, interpretation, and operation of provisions under the Texas Election Code and other election law.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 19, 2006.

TRD-200606823

Ann McGeehan
Director of Elections
Office of the Secretary of State
Effective date: January 8, 2007
Proposal publication date: September 8, 2006
For further information, please call: (512) 463-9871

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1 TAC §81.60

The new rule is adopted under the Texas Election Code (the "Code"), Chapter 31, Subchapter A, §31.003, which provides the Office of the Secretary of State with the authority to obtain and maintain uniformity in the application, interpretation, and operation of provisions under the Texas Election Code and other election law.

§81.60. Voting System Certification Procedures.

In addition to the procedures prescribed by the Texas Election Code, Chapter 122, compliance with the following procedures is required for certification of a voting system.

(1) The entity applying for certification must deliver seven copies of their completed application forms (Form 100, Form 101, and if applicable, Form 100 Schedule A), user operating and maintenance manuals, training material, nationally accredited voting system test laboratory reports, and a change log detailing changes from any previously certified system or component, to the Secretary of State no later than 45 days prior to examination. Six of the seven copies can be in electronic form. One copy must be in hard-copy format organized in binders with tabs and tables of contents.
Figure 1: 1 TAC §81.60(1)
Figure 2: 1 TAC §81.60(1)
Figure 3: 1 TAC §81.60(1)

(2) The applicant must have the nationally accredited voting system test laboratory deliver four copies of all nationally qualified software/firmware and source codes for the system and/or system components requested for Texas certification, directly to the Secretary of State no later than 45 days prior to examination.

(3) The applicant must authorize the nationally accredited voting system test laboratory to deliver all the applicable executable and installation files to the National Software Reference Library (NSRL) within 30 days after receiving federal certification.

(4) The certification fee for a new election management system, tabulation device, electronic ballot marker, and other complex component of a system is $3,000 each and must be received by the Secretary of State 45 days prior to examination. The certification fee for a modification of a voting system shall be determined by the Secretary of State according to the complexity of the modification, and must be received by the Secretary of State 45 days prior to the examination.

(5) Certification examinations will be scheduled by the Secretary of State three times a year during the months of January, May, and August, unless extenuating circumstances provide otherwise.

(6) The time and date of each examination will not be scheduled until after the entity applying for certification has delivered all required documentation and fees to the Secretary of State.

(7) All physical examinations of voting systems will take place at the Office of the Secretary of State, Elections Division, in Austin, unless extenuating circumstances provide otherwise.

(8) The applicant must demonstrate an installation and configuration of the software/firmware on each system and system component using the Secretary of State's copy of the software/firmware received from the nationally accredited voting system test laboratory.

(9) The applicant shall furnish a sufficient number of sample ballots, designed from the templates provided by the Secretary of State, at least one week prior to the examination.

(10) Examiner's must submit a written report to the Secretary of State stating his or her findings for each voting system no later than the 30th day after examination. Examiner reports shall be posted on the Secretary of State's website.

(11) An examiner appointed by the Secretary of State will be compensated after he or she files his or her written report.

(12) The Secretary of State must approve or disapprove the voting system(s) within 30 days of the required public hearing, unless there are extenuating circumstances.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 19, 2006.

TRD-200606824
Ann McGeehan
Director of Elections
Office of the Secretary of State
Effective date: January 8, 2007
Proposal publication date: September 8, 2006
For further information, please call: (512) 463-9871

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 355. REIMBURSEMENT RATES

SUBCHAPTER A. COST DETERMINATION PROCESS

1 TAC §355.114

The Health and Human Services Commission (HHSC) adopts the amendments to §355.114, concerning the Consumer Directed Services Payment Option, in its Reimbursement Rates Chapter, with a minor change to the proposed text as published in the September 22, 2006, issue of the *Texas Register* (31 TexReg 8057). The text of the rule will be republished.

The amended §355.114, is adopted to allow the following: (1) Remove the attendant compensation spending requirement language from the rule since a revised spending requirement is being proposed by the Department of Aging and Disability Services (DADS) in its program rules for Consumer Directed Services (CDS); (2) Remove billing language from the rule since billing guidelines are addressed in the DADS program rules; (3) Delete language limiting the Consumer Directed Services Payment Option to a specific list of programs, thereby giving HHSC the flexibility to offer the Consumer Directed Services Payment Option under the Texas Home Living (TxHmL) and Home and Community-based Services (HCS) waiver programs and, potentially, other programs in the future; and (4) Add new language that describes how the CDS rate will be modeled for the HCS program. HCS has a different rate structure than other waiver programs currently enrolled in CDS and, therefore, requires a different approach to determining the CDS rates.

HHSC has inserted the word "agency" in the last sentence of subsection (a) to clarify which contracted CDS payment rate is meant.

HHSC received one negative comment regarding the proposed rule during the comment period. The Private Providers Association of Texas (PPAT) issued a negative comment concerning the rule amendment.

Comment: Concerning the preamble to the rules, the commenter disagrees that there will be no adverse economic effect on small businesses as stated in the Impact Analysis on Small and Micro-Businesses in the preamble. The commenter states that the new option is being funded with a yet to be identified/published portion of the current reimbursement rate paid to providers rather than "new" funds. The commenter also adds that since there has not been a rate increase in the Home and Community-Based Services and Texas Home Living waivers in over 8 years, this proposal will result in a significant impact on providers with a concomitant potential to destabilize the provider network.

Response: The agency disagrees with the commenter's statement that there will be an adverse impact on program providers that will destabilize the provider network with the implementation of this methodology. The agency's position is that the CDS option will not affect a provider's financial viability. When an individual chooses the CDS option, the provider's work is reduced due to the fact that the provider is delivering fewer services to the individual. For individuals that choose the CDS option in the Home and Community-based Services program, a portion of the monthly rate associated with administration and operation costs for supported home living and respite services will be allocated from the program provider to the individual's budget. This allocation occurs because the program provider will see a reduction in its work related to the direct service delivery, coordination and oversight of these services for the individual under CDS. The individual (or his legally authorized representative) and not the program provider is the employer in CDS and the individual (or his legally authorized representative) manages the provision of these services under CDS. A similar allocation of administration and overhead cost to the individual's budget occurs in the Texas Home Living Waiver program, but occurs on an individual rate per service basis and not from a monthly rate basis. The rules themselves do not establish requirements that create an economic burden for program providers. The rule language was not changed in response to the comment.

The amendment is adopted under the Human Resources Code, §32.021, which provides HHSC with the authority to adopt rules necessary to administer the federal medical assistance (Medicaid) program in Texas; Texas Government Code, §531.033,

which authorizes the executive commissioner of HHSC to adopt rules necessary to carry out the commission's duties under Chapter 531; and Government Code §531.0055, which authorizes the executive commissioner to adopt rules for the operation and provision of health and human services by the health and human services agencies and to adopt or approve rates of payment required by law to be adopted or approved by a health and human services agency.

§355.114. Consumer Directed Services Payment Option.

(a) For all programs providing consumer directed services (CDS) except the Home and Community-based Services (HCS) program, the sum of the payment rate for the contracted CDS agency and the payment rate for the consumer participating in CDS must not exceed the payment rate made to contracted providers in these programs. The payment rate for the contracted CDS agency is determined by modeling the estimated cost to carry out the responsibilities of the CDS agency. The payment rate for the consumer is determined by subtracting the contracted CDS agency payment rate from the payment rate made to contracted providers in these programs.

(b) For the HCS program the payment rate for the contracted CDS agency is determined by modeling the estimated cost to carry out the responsibilities of the CDS agency. The payment rate for the consumer is modeled and is based on the direct care rate plus a portion of the operating costs from the case management fee. The sum of the payment rate for the contracted CDS agency, the consumer participating in CDS, and the case management fee remaining for the provider agency cannot exceed, on average, the amount paid to contracted providers for non-CDS consumers in these programs.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 21, 2006.

TRD-200606869
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Effective date: February 1, 2007
Proposal publication date: September 22, 2006
For further information, please call: (512) 424-6900

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TITLE 7. BANKING AND SECURITIES

PART 7. STATE SECURITIES BOARD

CHAPTER 111. SECURITIES EXEMPT FROM REGISTRATION

7 TAC §111.2

The Texas State Securities Board (Board) adopts an amendment to §111.2, concerning listed and designated securities, without changes to the proposed text as published in the October 20, 2006, issue of the *Texas Register* (31 TexReg 8603).

The amendment to subsection (a) removes an outdated reference to the Midwest Stock Exchange. New subsection (f) provides a definition of "national market system of the NASDAQ stock market." Unnecessary language is removed and the rule reflects recent changes by the NASDAQ stock market.

No comments were received regarding adoption of the amendment.

Statutory authority: Texas Civil Statutes, Article 581-28-1. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes.

Cross-reference to Statute: Texas Civil Statutes, Article 581-6.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 18, 2006.

TRD-200606799
Denise Voigt Crawford
Securities Commissioner
State Securities Board
Effective date: January 7, 2007
Proposal publication date: October 20, 2006
For further information, please call: (512) 305-8303

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TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 1. ADMINISTRATION

SUBCHAPTER B. UNDERWRITING, MARKET ANALYSIS, APPRAISAL, ENVIRONMENTAL SITE ASSESSMENT, PROPERTY CONDITION ASSESSMENT, AND RESERVE FOR REPLACEMENT RULES AND GUIDELINES

10 TAC §§1.31 - 1.37

The Texas Department of Housing and Community Affairs (the Department) adopts the repeal of §§1.31 - 1.37, concerning the 2006 Underwriting, Market Analysis, Appraisal, Environmental Site Assessment, Property Condition Assessment and Reserve for Replacement Rules and Guidelines, as published in the September 15, 2006, issue of the *Texas Register* (31 TexReg 7783).

THE DEPARTMENT RECEIVED NO PUBLIC COMMENTS THAT RELATE DIRECTLY TO THE REPEAL OF §§1.31 - 1.37.

The sections are repealed pursuant to the authority of the Texas Government Code, Chapter 2306.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 21, 2006.

TRD-200606875
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Effective date: January 10, 2007
Proposal publication date: September 15, 2006
For further information, please call: (512) 475-4595

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10 TAC §§1.31 - 1.37

The Texas Department of Housing and Community Affairs ("the Department" or "TDHCA") adopts §§1.31 - 1.37, concerning Underwriting, Market Analysis, Appraisal, Environmental Site Assessment, Property Condition Assessment, and Reserve for Replacement Rules and Guidelines, §§1.31 - 1.37 with changes to the text as published in the September 15, 2006, issue of the *Texas Register* (31 TexReg 7783).

These sections are adopted in order to maintain and establish stand alone guidelines for underwriting, market analysis, appraisal, environmental site assessment, and property condition assessment performed for requests submitted to the Department for review and the establishment of reserve for replacement and subsequent monitoring for developments funded through the Department.

On September 15, 2006 the Draft 2007 Underwriting, Market Analysis, Appraisal, Environmental Site Assessment, Property Condition Assessment, and Reserve for Replacement Rules and Guidelines were published in the *Texas Register*. Upon publication a public comment period commenced, ending on October 18, 2006. In addition to publishing the document in the *Texas Register*, a copy was published on the Department's web site and made available to the public upon request. The Department held public hearings in Houston, El Paso, Dallas, San Antonio, Midland, Tyler, Amarillo, Beaumont, Bryan, Corpus Christi, Harlingen, Brownwood and Austin. In addition to comments received at the public hearings, the Department received written comments.

The scope of the public comment concerning the Underwriting, Market Analysis, Appraisal, Environmental Site Assessment, Property Condition Assessment, and Reserve for Replacement Rules and Guidelines pertains to the following sections:

SUMMARY OF COMMENT RECEIVED UPON PUBLICATION OF THE PROPOSED RULES IN THE TEXAS REGISTER AND COMMENTS PROVIDED AT PUBLIC HEARINGS HELD BY THE DEPARTMENT ON ITEMS THAT RELATE DIRECTLY TO Underwriting, Market Analysis, Appraisal, Environmental Site Assessment, Property Condition Assessment, and Reserve for Replacement Rules and Guidelines.

§§1.31 - 1.37 - REA Rules - Individual

Comment: "The proposed rules for 2007 make changes which negatively impact the ability of TDHCA to effectively put affordable housing on the ground. The TDHCA Board should re-adopt the 2006 REA rules, which while imperfect, do not destroy the viability of the LIHTC Program."

Department Response: While reverting to the 2006 rules in their entirety is an option to consider, significant comment by the public and TDHCA Board during the course of the year suggest that many of the areas addressed in the draft 2007 rules need to be considered. Staff does not recommend reverting to the 2006 REA rules, but recommends adoption of the 2007 as proposed herein with changes based on comment presented below.

Board Response: Staff response accepted.

§§1.31 - 1.37 - REA Rules - Individuals

Comment: Allow for more credits per deal at application and during the underwriting process, resulting in more tax credit equity and less debt, thereby ensuring the long-term health of the Department's portfolio. Michigan allows a development to automatically apply for up to 5% additional credits in the year of cost certification.

Department Response: Essentially, the current rules do allow for "more credits per deal" at application. The draft 2007 rules including the QAP propose an increase in the spread in the applicable percentage used at underwriting in order to provide a cushion of tax credits for unforeseeable costs. Moreover, the Department rules already include contingency, 5% leeway in total development cost, and the maximum contractor and developer fees contemplated by the National Council of State Housing Agency's best practices. The current rules as proposed do not prohibit requests for additional 4% tax credits at cost certification. However, due to the high demand for competitive 9% tax credits, the Department is unable to "hold out" 5% of credits for future cost overruns. Competitive developments in need of additional credits may submit a full application and compete for the pool of 9% tax credits available in any given year. Staff does not recommend a change.

Board Response: Staff response accepted.

§1.32(d)(2)(I) - Reserves - Individuals and Texas Association of Community Development Corporations

Comment: The annual reserve account in §1.32(d)(2)(I) doesn't conform to statute. It needs to be readjusted back to $125 and $200 per unit because the statutes intent does not allow department discretion to adjust those amounts. Increasing the annual replacement reserve from $200 to $250 for new construction lowers the amount of debt by lowering the net operating income available for debt service.

Department Response: The TDHCA Governing Statute §2306.186 establishes a minimum reserve requirement for instances where the Department holds a first lien position. This legislation was passed in 2003. More current industry practice reflects higher reserves. The increase from $200 per unit to $250 per unit in annual replacement reserves deposits for new construction developments is based on two factors: (1) The National Council of State Housing Agencies' (NCSHA) Working Group on Housing Credit Allocation and Underwriting Recommended Practices as adopted by NCSHA's Board of Directors on December 2, 2003 - The Working Group included participants from 15 State Housing Agencies including TDHCA as well as 20 industry participants comprised of lenders, equity providers, accounting firms, and other affordable housing organizations; and (2) Minimum replacement reserve requirements indicated in commitments from lenders and syndicators submitted at application. Staff recommends no change.

Board Response: Staff response accepted.

§1.32(d)(3) - Net Operating Income - Individuals

Comment: If within 5% of the Underwriter's Net Operating Income (NOI) estimate, the Applicant's NOI conclusion should be used to determine debt coverage ratio and size the debt regardless of the difference in effective gross income and total annual operating expense figures. This could save staff time and would be in line with the real world.

Department Response: Often significant debt service capacity differences exist as a result of differences in estimates of achievable rent due to lower market study conclusions, miscalculated utility allowances, unjustified secondary income, or vacancy and collection loss estimates. Moreover, large differences in gross income or total expenses could be identified but offset each other which calls into question the reliability of the Applicant's NOI calculation. Staff recommends no change.

Board Response: Staff response accepted.

§1.32(d)(4)(D) - Acceptable Debt Coverage Ratio Range - Individuals

Comment: Increasing the debt coverage ratio minimum from 1.10 to 1.15 lowers the amount of debt available to the project. Also, the maximum debt coverage ratio should increase from 1.30 to 1.35 or 1.40 to allow for the possibility that income will not keep pace with expenses.

Department Response: Staff does not recommend a change to the proposed minimum debt coverage ratio. The minimum debt coverage ratio increase from 1.10 to 1.15 is based on three factors: (1) The National Council of State Housing Agencies' (NCSHA) Working Group on Housing Credit Allocation and Underwriting Recommended Practices as adopted by NCSHA's Board of Directors on December 2, 2003; (2) Minimum debt coverage ratio requirements indicated in commitments from lenders and syndicators submitted at application; and (3) research on minimum debt coverage ratios utilized by the majority of other State Housing Agencies. These three sources indicate that a minimum debt coverage ratio of 1.15 is a healthy standard. However, staff does recommend an increase in the maximum debt coverage ratio to 1.35 based on public comment and research into other State Housing Agency practices. The following language is proposed:

§1.32(d)(4)(D) Acceptable Debt Coverage Ratio Range. The acceptable Year 1 DCR range for all priority or foreclosable lien financing plus the Department's proposed financing falls between a minimum of 1.15 to a maximum of 1.35. HOPE VI and USDA Rural Development transactions may underwrite to a DCR less than 1.15 based upon documentation of acceptance from the lender.

Board Response: Staff response accepted.

§1.32(d)(5) - Long Term Proforma - Individuals

Comment: Some comment commended the change from a 30-year proforma to a 20-year proforma, but requested that the Department further reduce the term for the proforma from 20 years to 15 years.

Department Response: Staff recognizes the proposal to reduce the proforma requirement in the application to 15 or 20 years; however, the reference language in the proposed rule point to a requirement only of the underwriting staff to create a proforma. Staff recommends returning to a 30-year proforma created by the Underwriter to address the timeframes for affordability in the TDHCA Governing Statute as follows:

§2306.185. LONG-TERM AFFORDABILITY AND SAFETY OF MULTIFAMILY RENTAL HOUSING DEVELOPMENTS. (a) The department shall adopt policies and procedures to ensure that, for a multifamily rental housing development funded through loans, grants, or tax credits under this chapter, the owner of the development:

(1) keeps the rents affordable for low income tenants for the longest period that is economically feasible; and

(2) provides regular maintenance to keep the development sanitary, decent, and safe and otherwise complies with the requirements of § 2306.186.

(b) In implementing Subsection (a)(1) and in developing underwriting standards and application scoring criteria for the award of loans, grants, or tax credits to multifamily developments, the department shall ensure that the economic benefits of longer affordability terms and below market rate rents are accurately assessed and considered.

(c) The department shall require that a recipient of funding maintains the affordability of the multifamily housing development for households of extremely low, very low, low, and moderate incomes for the greater of a 30-year period from the date the recipient takes legal possession of the housing or the remaining term of the existing federal government assistance.

Although statute does not specifically address a proforma as the underwriting standard, the proforma is the fundamental financial planning tool for assessing the estimated long term financial capacity of the development. Staff proposes the continuation of the 30-year proforma review as part of the underwriting analysis. However, to address public comment staff proposes language change to reflect feasibility based on a minimum debt coverage ratio and positive cashflow limited to the first 15 years. In the absence of the 30-year proforma test to meet the intent of §2306.185, staff proposed the initial feasibility language in §1.32(i)(4).

§1.32(d)(5) Long Term Proforma. The Underwriter will create a 30-year operating proforma.

§1.32(i)(5) Long Term Feasibility. Any year in the first 15 years of the Long Term Proforma, as defined in subsection (d)(5) of this section, reflects

(A) negative Cash Flow; or

(B) a Debt Coverage Ratio below 1.15.

Board Response: Staff response accepted.

§1.32(d)(5)(A) - Base Year Projection - Individuals

Comment: Change to read "The base year projection utilized is the NOI determined under Provision 1.32(d)(3)." Change for consistency with changes proposed for §1.32(d)(3).

Department Response: Because staff recommended no change to §1.32(d)(3), staff recommends no change here. The current language is consistent with staff's earlier recommendation. If consistency with staff recommendation for §1.32(d)(3) above is not approved, this section of the rule would need to be readdressed.

Board Response: Staff response accepted.

§1.32(d)(5)(A)-(C) - Long Term Proforma - Individuals

Comment: A 3% growth of income and 4% growth of expenses is not justified. In reality, income is decreasing while expenses are

increasing. "For example, in Houston, the HUD maximum rents for all affordable unit levels has remained unchanged for three years. And, on top of that, the utility allowances have increased over the same time period. So, the true effective rents have actually decreased by 3%."

One commenter supports the objective criteria listed in this paragraph to allow for deviations from the numbers drawn from TDHCA databases to estimate costs.

Department Response: Research on income and expense trending rates used by other State Housing Agencies indicates a minimum spread of 1% with expenses increasing at a greater rate than income. This spread provides a generally conservative long-term underwriting criteria, though in the short term this spread can be larger or smaller. In addition, staff believes language in §1.32(d)(5)(C) provides greater flexibility in making adjustments to expense line-items over the proforma period while maintaining consistency. Staff recommends no change.

Board Response: Staff response accepted.

§1.32(d)(5)(D) - Long Term Proforma - Individual

Comment: Commenter disagrees with the striking of language requiring a development to pay back deferred developer fee within 15 years.

Department Response: Staff did not intend to delete this requirement when such items were moved to §1.32(i) feasibility conclusion. Staff concurs with the commenter and recommends the following change:

§1.32(i)(2) Deferred Developer Fee. Development requesting an allocation of tax credits cannot repay the estimated deferred developer fee, based on the Underwriter's recommended financing structure, from cashflow within the first 15 years of the long term proforma as described in subsection (d)(5) of this section.

Board Response: Staff response accepted.

§1.32(e)(3) - Site Work Costs - Individuals and Texas Affiliation of Affordable Housing Providers

Comment: The maximum limit per unit (without additional substantiation by a third party) should be raised to $9,000 to $10,000 per unit to account for an average inflation of 5% to 6% for the last five years and because there are costs associated with the engineer or architect support documentation.

Department Response: Sitework costs specifically identified and recently claimed at cost certification for 41 new construction developments that placed in service in 2004 and 2005 indicate a mean of $6,200 and a median of $6,400 per unit. These figures indicate $7,500 per unit is still a good benchmark for requiring additional third party documentation. It should be emphasized that this is merely a standard for submitting more substantiation. It is not a ceiling. Staff recommends changing the limit to $9,000 per unit to be consistent with the 2007 QAP.

§1.32(e)(3) Site Work Costs. Project site work costs exceeding $9,000 per Unit must be well documented and certified by a Third Party engineer on the required application form.

Board Response: Staff response accepted.

§1.32(e)(7) - Developer Fee - Individuals, Donna Housing Finance Corporation, McAllen Housing Authority, Edinburg Housing Authority, Corpus Christi Housing Authority, Pharr Housing Authority, Weslaco Housing Authority, Beaumont Housing Authority, Pharr Housing Authority, Flores Residential, Community Development Corporation of South Texas, and Texarkana Housing Authority

Comment: Language referring to limiting eligible deferred developer fee must be eliminated as it is against the preference for preserving or rehabilitating existing properties, including at-risk developments.

Department Response: The language codifies Department underwriting practices that have been consistently applied, including: developer fee included in eligible basis for calculation of the 9% tax credit limited to 15% of rehabilitation or new construction eligible basis (less the developer fee), and no developer fee is included in acquisition eligible basis for identity of interest transactions. Of 18 applications submitted for 9% tax credits and forwarded for full underwriting in 2006, 17 claimed acquisition eligible basis. Of the 17 claiming acquisition eligible basis only six (35%) represented identity of interest transactions with no acquisition developer fee included in calculation of the development's eligible tax credits. As of September 2006, acquisition/rehabilitation developments requesting 4% tax credits in conjunction with a multifamily bond reservation do not include identity of interest transactions. In addition, the number of preservation and at-risk developments continues to rise even with this practice in place. Staff recommends no change.

Board Response: Staff response accepted.

§1.32(e)(7)(B)(ii) - Developer Fee, identity of interest acquisition basis - Individuals

Comment: Verified acquisition overhead and expenses should be included in eligible basis for identity of interest transactions. In particular, Rural Development transactions that transfer to related parties are just as difficult to work out as those transferred to third parties.

Replace the existing language that prohibits Developer Fees on Identity of Interest transactions with this: "Developer expenses directly related to acquisition activities are allowable in Eligible Basis."

Department Response: The rule as it exists prevents an owner from profiting from the reacquisition of a property they already own or control. Developer fee for the construction/rehabilitation and new financing is allowed. Staff does not recommend a change.

Board Response: Staff response accepted.

§1.32(g)(3) - Supportive Housing - Texas Association of Community Development Corporations

Comment: Allow Single Room Occupancy developments (SROs) to keep replacement reserves at $200 per unit, because they just don't have the cash flow to make those reserves whole at the end of the year. SROs also should be inserted into the same category as rural developments where the management fee can be higher than the typical 5 percent; currently, they are anywhere between 6 and 8 percent.

Department Response: Staff does not recommend a change with regard to minimum replacement reserve requirements for supportive housing as there is as much, if not more, need for such reserves due to turnover and wear. Moreover, syndicators of such transactions have not indicated a reduced standard for these types of units. With regard to management fees, staff concurs and recommends the following change:

§1.32(g)(3)(B) Operating Expenses. A Supportive Housing Development may have significantly higher expenses for payroll, management fee, security, resident support services, or other items than typical Affordable Housing Developments. The Underwriter will rely heavily upon the historical operating expenses of other Supportive Housing Developments provided by the Applicant or otherwise available to the Underwriter.

Board Response: Staff response accepted.

§1.32(i)(1) - Inclusive Capture Rate - Individuals and Texas Association of Community Development Corporations, and O'Connor and Associates

Comment: The proposed rule changes lowering the capture rate for rural and senior developments from 100% to 50% would be detrimental to the affordable housing program; would lower the number of developments qualifying for HTC; and negate the statutory set-asides. The rule changes will increase the amount of work required to complete a market study and will increase the cost of the market study.

The demand from other sources that is allowed under current rules is not flexible enough to allow for these different types of demand. Based on research, a fraction of the demand comes from the primary market area, a fraction from the secondary market area, and another fraction from a larger area, sometimes outside of the state. Demand also originates from homeowners transitioning to rental and from households living within other households. Rule changes should be made that allow demand from these other sources before the capture rate is lowered. (67)

There are successful developments that would not have been approved under the proposed rules. Comment states that the current rule works quite well in rural areas and there are high-occupancy developments with an approximate 100% capture rate at application. Comment suggests a 100% capture rate for rural deals and a lower capture rate for urban senior developments.

Comment suggests a separate capture rate for urban and exurban developments. Current methodology for calculating demand includes a large percentage from renter turnover and rapidly growing exurban areas have a limited number of renter households. Comment suggests a 50% capture rate based solely on household growth without renter turnover.

Comment also supports a reduction in the inclusive capture limit from 100% to 50% for developments serving elderly residents. (54)

Staff rationale for the proposed rule is that demand varies by unit type; however occupancy analysis shows all unit types and income restrictions are in demand. The Ineligible Building Types rule in the QAP does not allow developers to match demand by unit type and therefore the proposed rule is in conflict with the QAP.

Department Response: Staff agrees that the rule change may require more evaluation of the true sources of demand and believes the lease audits recently conducted by Darrell Jack of ApartmentMarket Data are a good first step in identifying true demand (see discussion below on secondary market §1.32(d)(7)). Most market analysts currently rely on turnover for the normal movement of households from one development to another for 90% to 95% of the anticipated demand. A capture rate at 100% for rural developments and developments targeting seniors suggests that every potential household that moves must come to the subject and any other new unstabilized units in order for them to fill. This premise suggests that the developments these tenants are leaving will have a high vacancy rate and be financially stressed. The premise for reducing the maximum inclusive capture rate from 100% to 50% was to provide some relief for these existing developments, a sentiment raised regularly to the Board by impacted properties providing testimony Mr. Jack's review of 2006 applications suggests that 12 developments would not have been funded if this proposed rule was in place last year. However, the same review suggests that only three would not have been funded if the maximum inclusive capture rate had been reduced to 75%. Staff further evaluated the details of the developments and found that all but two developments would likely still have been funded under the proposed rules if larger acceptable primary market areas were chosen by the Market Analyst or if demand from secondary market had been identified. Staff also received concern with regard to the per unit capture rate within market study requirements §1.33(d)(9) & (10) (discussed later) and agrees that a feasibility test on a per unit basis may be premature. Staff recommends the following change to a 75% capture rate in these areas and recommends removing the per unit capture rate for determination of feasibility.

§1.32(i)

(1) Inclusive Capture Rate. Defined in §1.33 of this title. The Underwriter will independently verify the inclusive capture rate. The Development

(A) is characterized as Rural, Elderly or Special Needs and the inclusive capture rate is above 75% for the total proposed units; or

(B) is not characterized as Rural, Elderly or Special Needs and the inclusive capture rate is above 25% for the total proposed units.

(C) Developments meeting the requirements of subparagraph (A) or (B) of this paragraph may avoid being characterized as infeasible if clause (i) or (ii) of this paragraph apply.

(i) Replacement Housing. The Development is comprised of Affordable Housing which replaces previously existing substandard Affordable Housing within the Primary Market Area as defined in §1.33 of this title on a Unit for Unit basis, and gives the displaced tenants of the previously existing substandard Affordable Housing a leasing preference.

(ii) Existing Housing. The Development is comprised of existing Affordable Housing which is at least 80% occupied and gives displaced existing tenants a leasing preference as stated in the submitted relocation plan.

Board Response: Staff response accepted.

§1.32(i)(2) - Restricted Market Rent - Individuals, Apartment Market Data, and Texas Affiliation of Affordable Housing Providers

Comment: Just because you elect 60% AMI and are charging 40% AMI rents does not in and of itself make a deal unfeasible. Also, in many rural communities, it is impossible for properties to obtain full low-income housing tax credit rents. This provision needs to be deleted. (24)

The proposed rule is forcing developers to elect a lower rent level (50% of AMI) when the market may support higher a rent level in the future (60% of AMI).

The proposed rule would be detrimental to the affordable housing program, especially for applications from the Austin region. In the Austin area, no individual unit type by income level is less

than 91.9% occupied and this indicates that the market is not oversupplied.

The rule change will have wide ranging effects, including driving affordable housing into higher income areas. The proposed changes will exclude outlying areas from future development. Area Median Income is set for the entire MSA and outer areas have lower incomes and rental rates compared to the central areas.

Department Response: Staff agrees that other restrictions on a development such as USDA rent restrictions or local funding restrictions could limit rents below the tax credit rent. However, it is a basic principal of supply and demand that if the market price for comparable high quality units is less than a set affordability level, say 60% of AMI, then there is not an unmet need for units at 60% of AMI. Since, however, true comparability can be hard to measure, staff suggest that the proposed rule be modified to establish a lack of demand/infeasibility test where the comparable 60% restricted rent in the market is less than the maximum potential rent for households earning 50% of the median income. In this example, the application should reflect unit affordability set-asides at or below 50% of AMGI rather than 60%. This infeasibility criterion is not intended to disallow developments in areas with market rents below the 60% tax credit limit. The criteria's intent is to encourage developers to correctly structure transactions based on affordability levels at application. The following language is proposed:

§1.32(i)(3) Restricted Market Rent. The Restricted Market Rent for units with rents restricted at 60% of AMGI is less than both the net Program Rent and Market Rent for units with rents restricted at or below 50% of AMGI unless the development proposes all restricted units with rents restricted at or below the 50% of AMGI level.

Board Response: Staff response accepted with the provision that the rule language is changed to allow the Executive Director of the Texas Department of Housing and Community Affairs to make an exception to §1.32(i)(3) based on submitted supporting documentation as follows

§1.32(i)(3) Restricted Market Rent. The Restricted Market Rent for units with rents restricted at 60% of AMGI is less than both the net Program Rent and Market Rent for units with rents restricted at or below 50% of AMGI unless the development proposes all restricted units with rents restricted at or below the 50% of AMGI level. The requirement in this section may be waived by the Executive Director of the Department on appeal if documentation is submitted by the Applicant to support unique circumstances of the market that would provide mitigation.

§1.32(i)(3) - Initial Feasibility - Individuals and Texas Affiliation of Affordable Housing Providers

Comment: Just because the projected operating expenses are greater than 65% of income does not in and of itself make a deal unfeasible. In some instances, the financing structure will allow a deal with a 65% expense to income ratio to be feasible. The deals that are most affordable will be deemed infeasible. The Department should think through what it's trying to do. This provision needs to be eliminated.

Department Response: Lenders, syndicators and the state have typically focused on the debt coverage ratio as the key to determining if there is sufficient margin of income after expenses to cover annual debt service. This measure is typically adequate for an unrestricted development or where there is not a significant amount of extremely low rent targeting. When developments target deeper rents, their expense to income ratios generally rise (expenses remain the same but income goes down so this ratio goes up). The following graphs reflect the long term feasibility (year in which expenses plus debt service overwhelms income) for different expense to income ratios (reflected as lines) based upon different growth assumptions for expenses and income identified at the bottom.

Figure: 10 TAC Chapter 1--Preamble

The graphs indicate that when the growth rates for expenses and income are close to each other the point at which the expenses plus debt service surpasses income (the point where the transaction is projected to be no longer feasible) is more than 40 years in the future, well beyond normal amortization term of the principal loan. It is typical for financing participants to test the ongoing viability of a transaction by using a growth rate for expenses that is faster than the growth rate for income and most typically the spread between the two growth rates in the test is 1% or more. The Department has historically used a 4% growth rate for expenses and a 3% growth rate for income and the chart shows that with a 65% initial expense to income ratio and an initial DCR of 1.15, expenses plus debt service will overwhelm income in 32 years (the second chart shows the impact will be 35 years when the initial DCR is 1.35) Many lenders have indicated common use of a slightly more conservative 3% growth of expenses and 2% growth of income which cause the point of infeasibility for the same 65% expense to income ratio to be year 23 for a DCR starting at 1.15 and year 28 for a DCR starting at 1.35.

The 65% expense to income ratio is a new Department underwriting standard that has been developed to ensure the benefits of affordability for 30 years. If the 30 year positive cash flow requirement is removed as proposed in TAC §1.32(d)(5) above, the new 65% test would be the only measure attempting to address the underwriting direction expressed in Texas statute §2306.185. Comment provided no alternative income to expense ratio or specific language changes other than to have this removed in its entirety. Staff recommends no change.

Board Response: Staff response accepted.

§1.32(i)(5) - Exceptions - Individuals

Comment: "...this provision needs to be eliminated. First, you don't need (A) if you remove Provision 1.32(i)(2). Second, (B) through (E) favor PHA and RD developments over conventionally financed developments and the Texas statute states that the rules are to be written so that no one type of Applicant shall be favored over another type of Applicant."

Department Response: Staff agrees that §1.32(i)(5)(A) should be deleted based on the proposed change to §1.32(i)(2) Restricted Market Rent. Staff does not agree that the remaining exceptions, §1.32(i)(5)(B) - (E), should be eliminated. Developments receiving project-based rental assistance or operating subsidies should be treated differently because of the capacity of the subsidies to offset increases in operating expenses. Not providing these exceptions would cause these developments to be characterized as infeasible based on the rule when with the documented subsidy, they would be feasible. It should be noted that no Applicant is being favored in these cases, but rather feasibility is evaluated based on the objective status of rental assistance on a property. Staff recommends the following change:

§1.32(i)(6) Exceptions. Developments meeting the requirements of one or more of paragraphs (3) - (5) of this subsection

may be re-characterized as feasible if one or more of subparagraphs (A) - (C) of this paragraph and subparagraph (D) of this paragraph apply.

(A) The Development will receive Project-based Section 8 Rental Assistance and a firm commitment with terms including contract rent and number of units is submitted at application.

(B) The Development will receive rental assistance in association with USDA-RD-RHS financing.

(C) The Development will be characterized as public housing as defined by HUD.

(D) The units not receiving Project-based Section 8 Rental Assistance or rental assistance in association with USDA-RD-RHS financing, or not characterized as public housing do not propose rents that are less than the Project-based Section 8, USDA-RD-RHS financing, or public housing units.

Board Response: Staff response accepted.

§1.33(d)(7) - Secondary Market Area - Apartment Market Data

Comment: A Secondary Market Area (SMA) with a population limited to 250,000 for Urban/Exurban Family projects should be allowed. This recommendation is based on two lease audits conducted by Apartment MarketData for two income restricted projects - Eagle Ridge and Willow Bend. The audits show that only 50 - 55% of tenants previously resided within the PMA.

Department Response: While no specific language was proposed, staff agrees with the comments and appreciates the lease audit analysis conducted thus far by ApartmentMarket Data. The audit suggests that over 50% of tenants in two properties come from the immediate area (estimated primary market area) and that areas immediately surrounding the primary market area accounted for roughly 25% of tenants. The remainder came from other parts of the MSA, State and country. Thus a limit on demand from the secondary market is proposed in the revised language. Staff also notes and strongly encourages consideration of other demand sources. To be responsive to public comment, staff recommends the following change:

§1.33(d)(7) Secondary Market Area. All of the Market Analyst's conclusions specific to the subject Development must be based on only one Secondary Market Area definition. The entire PMA, as described in paragraph (8) of this subsection, must be contained within the Secondary Market boundaries. The Market Analyst must adhere to the methodology described in this paragraph when determining the secondary market area (§2306.67055).

(A) The Secondary Market Area will be defined by the Market Analyst with

(i) size based on a base year population of no more than 250,000 people for Developments targeting families, and

(ii) boundaries based on

(I) major roads,

(II) political boundaries, and

(III) natural boundaries.

(IV) A radius is prohibited as a boundary definition.

§1.33(d)(9)(E)(iv) Demand from Secondary Market Area.

(I) Apply the turnover rate as described in subparagraph (D) of this paragraph to the target, income-eligible, size-appropriate and tenure-appropriate households in the Secondary Market Area projected at the proposed placed in service date.

(II) Only 25% of the demand calculated in subclause (I) of this clause may be included in the calculation of demand as described in paragraph(10)(D) of this subsection and for use in calculation of inclusive capture rate as described in paragraph (10)(E) of this subsection. In addition, 25% of the Comparable Units from Unstabilized Developments within the Secondary Market Area must be included in the calculation of inclusive capture rate.

(v) Demand from Other Sources. The source of additional demand and the methodology used to calculate the additional demand must be clearly stated. Calculation of additional demand must factor in the adjustments described in clause (i) of this subparagraph.

§1.33(d)(10)(D) Demand. State the target, income-eligible, size-appropriate and tenure-appropriate household demand by Unit type by number of Bedrooms proposed and rent restriction category (e.g. one-Bedroom units restricted at 50% of AMFI; two-Bedroom units restricted at 60% of AMFI) by summing the demand components applicable to the subject Development discussed in paragraph (9)(E)(ii) - (v) of this subsection. State the total target, income-eligible, size-appropriate and tenure-appropriate household demand by summing the demand components applicable to the subject Development discussed in paragraph (9)(E)(ii) - (v) of this subsection.

Board Response: Staff response accepted.

§1.33(d)(9) and (10) - Demand and Capture Rate by Unit Type and Demand from Turnover and Population Growth--Individuals, Apartment Market Data, O'Connor and Associates, and Texas Affiliation of Affordable Housing Providers

Comment: The proposed rule would be detrimental to the affordable housing program. Comment identifies the impact of the rule change as reducing the number of developments qualifying for the HTC program. Comment states that Department staff has not sufficiently modeled the impact of the change. Analysis by commenter shows 5 out of 6 developments approved by the Board would not have been recommended for funding under the new proposed rule. One specific development that, according to the commenter, would not have been recommended leased up much more quickly than anticipated. Further investigation revealed that 53% of the development's demand originated from renter households and 40% of the demand originated from households living with another household. Comment suggests reverting to the demand capture rate found significant in the 2006 rules.

Staff rationale for the proposed rule is that demand varies by unit type; however occupancy analysis shows all unit types and income restrictions are in demand. The Ineligible Building Types rule in the QAP does not allow developers to match demand by unit type and therefore the proposed rule is in conflict with the QAP.

One individual suggested rule changes will increase the amount of work required to complete a market study and will increase the cost of the market study. It is difficult to get this type of information by unit type. Comment state that market analysts currently evaluate the proposed unit mix.

Comment suggests a separate capture rate for urban and exurban developments. The current methodology for calculating demand includes a large percentage from renter turnover and

rapidly growing exurban areas have a limited number of renter households. Comment suggests a 50% capture rate based solely on household growth without renter turnover.

Department Response: The infeasibility criteria in §1.32(i)(1) has been adjusted to no longer include capture rate by unit type and income set-aside. However, the proposed language in §1.33(d)(9) and (10) provides a mechanism for market analysts to fulfill the requirement from §1.33(d)(10)(A) to provide a best possible unit mix conclusion by occupancy and demand. The best possible unit mix requirement was added to the 2005 REA Rules; however, Market Analysts have failed to provide sufficient support for their conclusions. Staff recommends no change.

Regarding an exurban capture rate, the current rule and proposed changes allow sufficient flexibility for demand from other sources.

Board Response: Staff response accepted.

§1.33(f) - Individuals

Comment: Comment suggests the following wording: "Absent compelling written or other physical evidence to the contrary, the Department shall be bound by the opinion of the Market Analyst." Comment states that compelling, documented evidence that contradicts the market study should be included in the underwriting report. This also ignores the statutory mandate in §2306.6710, Government Code, requiring that the Department evaluate financial feasibility on the basis of the third-party proforma provided with the application.

Department Response: It is the responsibility of the Department to review and evaluate market information received regarding proposed developments. Staff utilizes the information presented in the market study to generate independent conclusions supported by additional information as available. Further the statutory mandate in §2306.6710 is clearly limited to allocation of points, not the underwriting analysis. Staff recommends no change.

Board Response: Staff response accepted.

§1.36(a) - Property Condition Assessment - Individuals and Texas Association of Affordable Housing Providers

Comment: The minimum term for the Expected Repair and Replacement Over Time analysis is 30 years. This should be reduced to 15 years. PCA requirements should either be eliminated for rehabilitation developments or required for both rehabilitation developments and new construction. Commenter recommends in descending order of preference: (1) complete removal of PCA requirement; (2) require a PCA with estimated costs of repairs over 15 years; or (3) impose PCA requirements on both rehab and new construction if a 30-year period is retained.

Department Response: Staff will adjust the minimum term for Expected Repair and Replacement Over Time analysis to be consistent with the approved long term proforma period. Staff does not recommend doing away with the PCA requirement for rehabilitation developments or adding the requirement for new construction developments. The PCA comprises not only a reserve for replacement analysis, but also a third party verification of planned rehabilitation construction costs. Staff suggests the question of requiring a reserve for replacement analysis for new construction developments be addressed in the 2008 rules. Staff recommends changing the minimum term for Expected Repair and Replacement Over Time analysis to 15 years to be consistent with the approved long term proforma period.

(C) Expected Repair and Replacement Over Time. The term during which the PCA should estimate the cost of expected repair and replacement over time must equal the longest term of any land use or regulatory restrictions which are, or will be, associated with the provision of housing on the property. The PCA must estimate the periodic costs which are expected to arise for repairing or replacing each system or component or the property, based on the estimated remaining useful life of such system or component as described in paragraph (1) of this subsection adjusted for completion of repair and replacement immediately necessary and proposed as described in subparagraphs (A) and (B) of this paragraph. The PCA must include a separate table of the estimated long term costs which identifies in each line the individual component of the property being examined, and in each column the year during the term in which the costs are estimated to be incurred. and no less than 15 years. The estimated costs for future years should be given in both present dollar values and anticipated future dollar values assuming a reasonable inflation factor of not less than 2.5% per annum.

Board Response: Staff response accepted.

§1.36(d) - Property Condition Assessment - Individual

Comment: The date of the PCA should not be changed to no more than 3 months prior to the date of application. The date should remain at no more than 6 months prior to the date of application.

Department Response: Staff concurs and recommends the following:

(d) The PCA shall be conducted by a Third Party at the expense of the Applicant, and addressed to TDHCA as the client. Copies of reports provided to TDHCA which were commissioned by other financial institutions should address TDHCA as a co-recipient of the report, or letters from both the provider and the recipient of the report should be submitted extending reliance on the report to TDHCA. The PCA report should also include a statement that the person or company preparing the PCA report will not materially benefit from the Development in any other way than receiving a fee for performing the PCA. The PCA report must contain a statement indicating the report preparer has read and understood the requirements of this section. The PCA should be signed and dated by the Third Party report provider not more than six months prior to the date of the application.

Board Response: Staff response accepted.

ADMINISTRATIVE CLARIFICATIONS AND CORRECTIONS

Public comment regarding the proposed REA Rules received during the November 9, 2006 Board meeting and new comment has been incorporated into the reasoned responses (§1.32(d)(4)(D) - Acceptable Debt Coverage Ratio Range and §1.32(i)(2) - Restricted Market Rent). In addition, working with the public, staff has identified an area requiring further clarification. Revisions have been incorporated into this recommendation. The four changes to the REA Rules since the November 9, 2006 meeting are summarized as follows:

1. §1.32(e)(3) - Site Work Costs

Staff recommends changing the maximum site work cost limit to $9,000 per unit without additional substantiation by a third party to be consistent with the 2007 QAP.

Board Response: Accepted.

2. §1.32(e)(7) - Developer Fee

Staff recommends changing the developer fee limit for developments with 49 or fewer units to 20% of Total Eligible Basis less developer fees to be consistent with the 2007 QAP.

§1.32(e)(7) Developer Fee. Developer fee claimed must be proportionate to the work for which it is earned and consistent with §49.9(d)(6) of this title.

(A) For Tax Credit Developments, the development cost associated with developer fees and Development Consultant (also known as Housing Consultant) fees included in Eligible Basis cannot exceed 15% of the project's Total Eligible Basis less developer fees for developments proposing 50 units or more and 20% of the project's Total Eligible Basis less developer fees for developments proposing 49 units or less, as defined in the QAP.

(B) In the case of a transaction requesting acquisition Tax Credits

(i) the allocation of eligible developer fee in calculating rehabilitation/new construction Tax Credits will not exceed 15% of the rehabilitation/new construction basis less developer fees for developments proposing 50 units or more and 20% of the rehabilitation/new construction basis less developer fees for developments proposing 49 units or less, and

Board Response: Accepted.

3. §1.33(d)(7) - Secondary Market Area

Staff recommends adding language clarifying the use of unstabilized comparables from the secondary market area. Conversations with the public revealed the need for further clarification.

Board Response: Accepted.

4. §1.36(a)- Property Condition Assessment

Staff recommends changing the minimum term for Expected Repair and Replacement Over Time analysis to 15 years to be consistent with the approved long term proforma period.

Board Response: Accepted.

The new sections are adopted pursuant to the authority of the Texas Government Code, Chapter 2306.

§1.31. General Provisions.

(a) Purpose. The Rules in this subchapter apply to the underwriting, market analysis, appraisal, environmental site assessment, property condition assessment, and reserve for replacement standards employed by the Texas Department of Housing and Community Affairs (the "Department" or "TDHCA"). This chapter provides rules for the underwriting review of an affordable housing development's financial feasibility and economic viability that ensures the most efficient allocation of resources while promoting and preserving the public interest in ensuring the long-term health of the Department's portfolio. In addition, this chapter guides the underwriting staff in making recommendations to the Executive Award and Review Advisory Committee ("the Committee"), Executive Director, and TDHCA Governing Board ("the Board") to help ensure procedural consistency in the determination of Development feasibility (§§2306.0661(f) and 2306.6710(d), Texas Government Code). Due to the unique characteristics of each development the interpretation of the rules and guidelines described in this subchapter is subject to the discretion of the Department and final determination by the Board.

(b) Definitions. Many of the terms used in this subchapter are defined in the Department's Housing Tax Credit Program Qualified Allocation Plan and Rules, known as the "QAP", as proposed. Those terms that are not defined in the QAP or which may have another meaning when used in subchapter B of this title, shall have the meanings set forth in this subsection unless the context clearly indicates otherwise.

(1) Affordable Housing--Housing that has been funded through one or more of the Department's programs or other local, state or federal programs or has at least one unit that is restricted in the rent that can be charged either by a Land Use Restriction Agreement or other form of Deed Restriction.

(2) Bank Trustee--A bank authorized to do business in this state, with the power to act as trustee.

(3) Cash Flow--The funds available from operations after all expenses and debt service required to be paid has been considered.

(4) Credit Underwriting Analysis Report--Sometimes referred to as the "Report." A decision making tool used by the Department and Board containing a synopsis and reconciliation of the application information submitted by the Applicant.

(5) Comparable Unit--A Unit, when compared to the subject Unit, similar in overall condition, unit amenities, utility structure, and common amenities, and

(A) for purposes of calculating the inclusive capture rate targets the same population and is likely to draw from the same demand pool;

(B) for purposes of estimating the Restricted Market Rent targets the same population and is similar in net rentable square footage and number of bedrooms; or

(C) for purposes of estimating the subject Unit market rent does not have any income or rent restrictions and is similar in net rentable square footage and number of bedrooms.

(6) Contract Rent--Maximum Rent Limits based upon current and executed rental assistance contract(s), typically with a federal, state or local governmental agency.

(7) DCR--Debt Coverage Ratio. Sometimes referred to as the "Debt Coverage" or "Debt Service Coverage." A measure of the number of times loan principal and interest are covered by Net Operating Income.

(8) Development--Sometimes referred to as the "Subject Development." Multi-unit residential housing that meets the affordability requirements for and requests or has received funds from one or more of the Department's sources of funds.

(9) EGI--Effective Gross Income. The sum total of all sources of anticipated or actual income for a rental Development less vacancy and collection loss, leasing concessions, and rental income from employee-occupied units that is not anticipated to be charged or collected.

(10) ESA--Environmental Site Assessment. An environmental report that conforms with the Standard Practice for Environmental Site Assessments: Phase I Assessment Process (ASTM Standard Designation: E 1527) and conducted in accordance with the Department's Environmental Site Assessment Rules and Guidelines in §1.35 of this subchapter as it relates to a specific Development.

(11) First Lien Lender--A lender whose lien has first priority.

(12) Gross Program Rent--Sometimes called the "Program Rents." Maximum Rent Limits based upon the tables promulgated by the Department's division responsible for compliance by program

and by county or Metropolitan Statistical Area ("MSA") or Primary Metropolitan Statistical Area ("PMSA").

(13) Market Analysis--Sometimes referred to as "Market Study." An evaluation of the economic conditions of supply, demand and rental rates or pricing conducted in accordance with the Department's Market Analysis Rules and Guidelines in §1.33 of this subchapter as it relates to a specific Development.

(14) Market Rent--The unrestricted rent concluded by the Market Analyst for a particular unit type and size after adjustments are made to rents charged by owners of Comparable Units.

(15) NOI--Net Operating Income. The income remaining after all operating expenses, including replacement reserves and taxes have been paid.

(16) Primary Market--Sometimes referred to as "Primary Market Area" or "Submarket" or "PMA". The area defined by the Qualified Market Analyst as described in §1.33(d)(8) of this title from which a proposed or existing Development is most likely to draw the majority of its prospective tenants or homebuyers.

(17) PCA--Property Condition Assessment. Sometimes referred to as "Physical Needs Assessment," "Project Capital Needs Assessments," "Property Condition Report," or "Property Work Write-Up." An evaluation of the physical condition of the existing property and evaluation of the cost of rehabilitation conducted in accordance with the Department's Property Condition Assessment Rules and Guidelines in §1.36 of this title as it relates to a specific Development.

(18) Rent Over-Burdened Households--Non-elderly households paying more than 35% of gross income towards total housing expenses (unit rent plus utilities) and elderly households paying more than 40% of gross income towards total housing expenses.

(19) Reserve Account--An individual account:

(A) Created to fund any necessary repairs for a multifamily rental housing development; and

(B) Maintained by a First Lien Lender or Bank Trustee.

(20) Restricted Market Rent--The restricted rent concluded by the Market Analyst for a particular unit type and size after adjustments are made to rents charged by owners of Comparable Units with the same rent and income restrictions.

(21) Secondary Market--Sometimes referred to as "Secondary Market Area". The area defined by the Qualified Market Analyst as described in §1.33(d)(7) of this title.

(22) Supportive Housing--Sometimes referred to as "Transitional Housing." Rental housing intended solely for occupancy by individuals or households transitioning from homelessness or abusive situations to permanent housing and typically consisting primarily of efficiency units.

(23) Sustaining Occupancy--The occupancy level at which rental income plus secondary income is equal to all operating expenses and mandatory debt service requirements for a Development.

(24) TDHCA Operating Expense Database--Sometimes referred to as "TDHCA Database." A consolidation of recent actual operating expense information collected through the Department's Annual Owner Financial Certification process and published on the Department's web site.

(25) Underwriter--The author(s), as evidenced by signature, of the Credit Underwriting Analysis Report.

(26) Unstabilized Development--A Development with Comparable Units that has been approved for funding by the TDHCA Board or is currently under construction or has not maintained a 90% occupancy level for at least 12 consecutive months following construction completion.

(27) Utility Allowance--The estimate of tenant-paid utilities, based either on the most current HUD Form 52667, "Section 8, Existing Housing Allowance for Tenant-Furnished Utilities and Other Services," provided by the local entity responsible for administering the HUD Section 8 program with most direct jurisdiction over the majority of the buildings existing or a documented estimate from the utility provider proposed in the Application. Documentation from the local utility provider to support an alternative calculation can be used to justify alternative Utility Allowance conclusions but must be specific to the Subject Development and consistent with the building plans provided.

(28) Work Out Development--A financially distressed Development seeking a change in the terms of Department funding or program restrictions based upon market changes.

(c) Appeals. Certain programs contain express appeal options. Where not indicated, 10 Tex. Admin. Code §§1.7 and 1.8 include general appeal procedures. In addition, the Department encourages the use of Alternative Dispute Resolution methods as outlined in 10 TAC §1.17.

§1.32. Underwriting Rules and Guidelines.

(a) General Provisions. The Department Governing Board has authorized the development of these rules under its authority under §2306.148, Texas Government Code. The rules provide a mechanism to produce consistent information in the form of an Underwriting Report to provide interested parties information the Board relies upon in balancing the desire to assist as many Texans as possible by providing no more financing than necessary and have independent verification that Developments are economically feasible. The Report generated in no way guarantees or purports to warrant the actual performance, feasibility, or viability of the Development by the Department.

(b) Report Contents. The Report provides an organized and consistent synopsis and reconciliation of the application information submitted by the Applicant.

(c) Recommendations in the Report. The conclusion of the Report includes a recommended award of funds or allocation of Tax Credits based on the lesser amount calculated by the program limit method (if applicable), gap/DCR method, or the amount requested by the Applicant as further described in paragraphs (1) - (3) of this subsection, and states any feasibility conditions to be placed on the award.

(1) Program Limit Method. For Developments requesting Housing Tax Credits, this method is based upon calculation of Eligible Basis after applying all cost verification measures and program limits as described in this section. The Applicable Percentage used is as defined in the QAP. For Developments requesting funding through a Department program other than Housing Tax Credits, this method is based upon calculation of the funding limit based on current program rules at the time of underwriting.

(2) Gap/DCR Method. This method evaluates the amount of funds needed to fill the gap created by total development cost less total non-Department-sourced funds or Tax Credits. In making this determination, the Underwriter resizes any anticipated deferred developer fee down to zero before reducing the amount of Department funds or Tax Credits. In the case of Housing Tax Credits, the syndication proceeds needed to fill the gap in permanent funds are divided by the syndication rate to determine the amount of Tax Credits. In making

this determination, the Department adjusts the permanent loan amount and/or any Department-sourced loans, as necessary, such that it conforms to the DCR standards described in this section.

(3) The Amount Requested. The amount of funds that is requested by the Applicant as reflected in the application documentation.

(d) Operating Feasibility. The operating financial feasibility of Developments funded by the Department is tested by adding total income sources and subtracting vacancy and collection losses and operating expenses to determine Net Operating Income. This Net Operating Income is divided by the annual debt service to determine the Debt Coverage Ratio. The Underwriter characterizes a Development as infeasible from an operational standpoint when the Debt Coverage Ratio does not meet the minimum standard set forth in paragraph (4)(D) of this subsection. The Underwriter may choose to make adjustments to the financing structure, such as lowering the debt and increasing the deferred developer fee that could result in a re-characterization of the Development as feasible based upon specific conditions set forth in the Report.

(1) Income. In determining the Year 1 proforma, theThe Underwriter evaluates the reasonableness of the Applicant's income estimate by determining the appropriate rental rate per unit based on contract, program and market factors. Miscellaneous income and vacancy and collection loss limits as set forth in subparagraphs (B) and (C) of this paragraph, respectively, are applied unless well-documented support is provided.

(A) Rental Income. The Program Rent less Utility Allowances or Market Rent or Restricted Market Rent or Contract Rent is utilized by the Underwriter in calculating the rental income for comparison to the Applicant's estimate in the application. Where multiple programs are funding the same units, Contract Rents are used, if applicable. If Contract Rents do not apply, the lowest Program Rents less Utility Allowance ("net Program Rent") or Market Rents or Restricted Market Rent, as determined by the Market Analysis that are lower than the net Program Rents, are utilized.

(i) Market Rents. The Underwriter reviews the attribute adjustment matrix of Comparable Units by unit size provided by the Market Analyst and determines if the adjustments and conclusions made are reasoned and well documented. The Underwriter uses the Market Analyst's conclusion of adjusted Market Rent by unit, as long as the proposed Market Rent is reasonably justified and does not exceed the highest existing unadjusted market comparable rent. Random checks of the validity of the Market Rents may include direct contact with the comparable properties. The Market Analyst's attribute adjustment matrix should include, at a minimum, adjustments for location, size, amenities, and concessions as more fully described in §1.33 of this title.

(ii) Restricted Market Rent. The Underwriter reviews the attribute adjustment matrix of Comparable Units by unit size and income and rent restrictions provided by the Market Analyst and determines if the adjustments and conclusions made are reasoned and well documented. The Underwriter uses the Market Analyst's conclusion of adjusted Restricted Market Rent by unit, as long as the proposed Restricted Market Rent is reasonably justified and does not exceed the highest existing unadjusted market comparable restricted rent. Random checks of the validity of the Restricted Market Rents may include direct contact with the comparable properties. The Market Analyst's Attribute Adjustment Matrix should include, at a minimum, adjustments for location, size, amenities, and concessions as more fully described in §1.33 of this title.

(iii) Program Rents less Utility Allowance. The Underwriter reviews the Applicant's proposed rent schedule and determines if it is consistent with the representations made in the remainder of the application. The Underwriter uses the Program Rents as promulgated by the Department's division responsible for compliance for the year that is most current at the time the underwriting begins. When underwriting for a simultaneously funded competitive round, all of the applications are underwritten with the rents promulgated for the same year. Program Rents are reduced by the Utility Allowance. The Utility Allowance figures used are determined based upon what is identified in the application by the Applicant as being a utility cost paid by the tenant and upon other consistent documentation provided in the application.

(I) Units must be individually metered for all utility costs to be paid by the tenant.

(II) Gas utilities are verified on the building plans and elsewhere in the application when applicable.

(III) Trash allowances paid by the tenant are rare and only considered when the building plans allow for individual exterior receptacles.

(IV) Refrigerator and range allowances are not considered part of the tenant-paid utilities unless the tenant is expected to provide their own appliances, and no eligible appliance costs are included in the development cost breakdown.

(iv) Contract Rents. The Underwriter reviews submitted rental assistance contracts to determine the Contract Rents currently applicable to the Development. Documentation supporting the likelihood of continued rental assistance is also reviewed. The underwriting analysis will take into consideration the Applicant's intent to request a Contract Rent increase. At the discretion of the Underwriter, the Applicant proposed rents may be used in the underwriting analysis with the recommendations of the Report conditioned upon receipt of final approval of such increase.

(B) Miscellaneous Income. All ancillary fees and miscellaneous secondary income, including but not limited to late fees, storage fees, laundry income, interest on deposits, carport rent, washer and dryer rent, telecommunications fees, and other miscellaneous income, are anticipated to be included in a $5 to $15 per unit per month range. Exceptions may be made at the discretion of the Underwriter for garage income, pass-through utility payments, pass-through water, sewer and trash payments, cable fees, congregate care/assisted living/elderly facilities, and child care facilities.

(i) Exceptions must be justified by operating history of existing comparable properties.

(ii) The Applicant must show that the tenant will not be required to pay the additional fee or charge as a condition of renting an apartment unit and must show that the tenant has a reasonable alternative.

(iii) The Applicant's operating expense schedule should reflect an offsetting cost associated with income derived from pass-through utility payments, pass-through water, sewer and trash payments, and cable fees.

(iv) Collection rates of exceptional fee items will generally be heavily discounted.

(v) If the total secondary income is over the maximum per unit per month limit, any cost associated with the construction, acquisition, or development of the hard assets needed to produce an additional fee may also need to be reduced from Eligible Basis for Tax Credit Developments as they may, in that case, be considered to be

a commercial cost rather than an incidental to the housing cost of the Development.

(C) Vacancy and Collection Loss. The Underwriter uses a vacancy rate of 7.5% (5% vacancy plus 2.5% for collection loss) unless the Market Analysis reflects a higher or lower established vacancy rate for the area. Elderly and 100% project-based rental subsidy Developments and other well documented cases may be underwritten at a combined 5% at the discretion of the Underwriter if the historical performance reflected in the Market Analysis is consistently higher than a 95% occupancy rate.

(D) Effective Gross Income. The Underwriter independently calculates EGI. If the EGI figure provided by the Applicant is within 5% of the EGI figure calculated by the Underwriter, the Applicant's figure is characterized as reasonable in the Report; however, for purposes of calculating DCR the Underwriter will maintain and use its independent calculation unless the Applicant's proforma meets the requirements of paragraph (3) of this subsection.

(2) Expenses. In determining the Year 1 proforma, the Underwriter evaluates the reasonableness of the Applicant's expense estimate by line item comparisons based upon the specifics of each transaction, including the type of Development, the size of the units, and the Applicant's expectations as reflected in their proforma. Historical stabilized certified or audited financial statements of the Development or Third Party quotes specific to the Development will reflect the strongest data points to predict future performance. The Department's database of property in the same location or region as the proposed Development also provides heavily relied upon data points. Data from the Institute of Real Estate Management's (IREM) most recent Conventional Apartments-Income/Expense Analysis book for the proposed Development's property type and specific location or region may be referenced. In some cases local or project-specific data such as Public Housing Authority ("PHA") Utility Allowances and property tax rates are also given significant weight in determining the appropriate line item expense estimate. Finally, well documented information provided in the Market Analysis, the application, and other sources may be considered.

(A) General and Administrative Expense. General and Administrative Expense includes all accounting fees, legal fees, advertising and marketing expenses, office operation, supplies, and equipment expenses. The underwriting tolerance level for this line item is 20%.

(B) Management Fee. Management Fee is paid to the property management company to oversee the effective operation of the property and is most often based upon a percentage of Effective Gross Income as documented in the management agreement contract. Typically, 5% of the Effective Gross Income is used, though higher percentages for rural transactions that are consistent with the TDHCA Database can be concluded. Percentages as low as 3% may be utilized if documented by a fully executed management contract agreement with an acceptable management company. The Underwriter will require documentation for any percentage difference from the 5% of the Effective Gross Income standard.

(C) Payroll and Payroll Expense. Payroll and Payroll Expense includes all direct staff payroll, insurance benefits, and payroll taxes including payroll expenses for repairs and maintenance typical of a conventional development. It does not, however, include direct security payroll or additional supportive services payroll. The underwriting tolerance level for this line item is 10%.

(D) Repairs and Maintenance Expense. Repairs and Maintenance Expense includes all repairs and maintenance contracts and supplies. It should not include extraordinary capitalized expenses that would result from major renovations. Direct payroll for repairs and maintenance activities are included in payroll expense. The underwriting tolerance level for this line item is 20%.

(E) Utilities Expense (Gas & Electric). Utilities Expense includes all gas and electric energy expenses paid by the owner. It includes any pass-through energy expense that is reflected in the EGI. The underwriting tolerance level for this line item is 30%.

(F) Water, Sewer and Trash Expense. Water, Sewer and Trash Expense includes all water, sewer and trash expenses paid by the owner. It would also include any pass-through water, sewer and trash expense that is reflected in the EGI. The underwriting tolerance level for this line item is 30%.

(G) Insurance Expense. Insurance Expense includes any insurance for the buildings, contents, and liability but not health or workman's compensation insurance. The underwriting tolerance level for this line item is 30%.

(H) Property Tax. Property Tax includes all real and personal property taxes but not payroll taxes. The underwriting tolerance level for this line item is 10%.

(i) The per unit assessed value will be calculated based on the capitalization rate published on the county taxing authority's website. If the county taxing authority does not publish a capitalization rate on the internet, a capitalization rate of 10% will be used or comparable assessed values may be used in evaluating this line item expense.

(ii) Property tax exemptions or proposed payment in lieu of tax agreement (PILOT) must be documented as being reasonably achievable if they are to be considered by the Underwriter. At the discretion of the Underwriter, a property tax exemption that meets known federal, state and local laws may be applied based on the tax-exempt status of the Development Owner and its Affiliates.

(I) Reserves. Reserves include annual reserve for replacements of future capitalizable expenses as well as any ongoing additional operating reserve requirements. The Underwriter includes minimum reserves of $250 per unit for new construction and $300 per unit for all other Developments. The Underwriter may require an amount above $300 for Developments other than new construction based on information provided in the PCA. Higher levels of reserves also may be used if they are documented in the financing commitment letters.

(J) Other Expenses. The Underwriter will include other reasonable and documented expenses, not including depreciation, interest expense, lender or syndicator's asset management fees, or other ongoing partnership fees. Lender or syndicator's asset management fees or other ongoing partnership fees also are not considered in the Department's calculation of debt coverage. The most common other expenses are described in more detail in clauses (i) - (iv) of this subparagraph.

(i) Supportive Services Expense. Supportive Services Expense includes the documented cost to the owner of any non-traditional tenant benefit such as payroll for instruction or activities personnel. The Underwriter will not evaluate any selection points for this item. The Underwriter's verification will be limited to assuring any anticipated costs are included. For all transactions supportive services expenses are considered in calculating the Debt Coverage Ratio.

(ii) Security Expense. Security Expense includes contract or direct payroll expense for policing the premises of the Development. The Applicant's amount is typically accepted as provided. The Underwriter will require documentation of the need for security

expenses that exceed 50% of the anticipated payroll expense estimate discussed in subparagraph (C) of this paragraph.

(iii) Compliance Fees. Compliance fees include only compliance fees charged by TDHCA. The Department's charge for a specific program may vary over time; however, the Underwriter uses the current charge per unit per year at the time of underwriting. For all transactions compliance fees are considered in calculating the Debt Coverage Ratio.

(iv) Cable Television Expense. Cable Television Expense includes fees charged directly to the owner of the Development to provide cable services to all units. The expense will be considered only if a contract for such services with terms is provided and income derived from cable television fees is included in the projected EGI. Cost of providing cable television in only the community building should be included in General and Administrative Expense as described in subparagraph (A) of this paragraph.

(K) The Department will communicate with and allow for clarification by the Applicant when the overall expense estimate is over 5% greater or less than the Underwriter's estimate. In such a case, the Underwriter will inform the Applicant of the line items that exceed the tolerance levels indicated in this paragraph, but may request additional documentation supporting some, none or all expense line items. If an acceptable rationale for the difference is not provided, the discrepancy is documented in the Report and the justification provided by the Applicant and the countervailing evidence supporting the Underwriter's determination is noted. If the Applicant's total expense estimate is within 5% of the final total expense figure calculated by the Underwriter, the Applicant's figure is characterized as reasonable in the Report; however, for purposes of calculating DCR the Underwriter will maintain and use its independent calculation unless the Applicant's Year 1 proforma meets the requirements of paragraph (3) of this subsection.

(3) Net Operating Income. NOI is the difference between the EGI and total operating expenses. If the Year 1 NOI figure provided by the Applicant is within 5% of the Year 1 NOI figure calculated by the Underwriter, the Applicant's figure is characterized as reasonable in the Report; however, for purposes of calculating the Year 1 DCR the Underwriter will maintain and use his independent calculation of NOI unless the Applicant's Year 1 EGI, Year 1 total expenses, and Year 1 NOI are each within 5% of the Underwriter's estimates.

(4) Debt Coverage Ratio. Debt Coverage Ratio is calculated by dividing Net Operating Income by the sum of loan principal and interest for all permanent sources of funds. Loan principal and interest, or "Debt Service," is calculated based on the terms indicated in the submitted commitments for financing. Terms generally include the amount of initial principal, the interest rate, amortization period, and repayment period. Unusual financing structures and their effect on Debt Service will also be taken into consideration.

(A) Interest Rate. The interest rate used should be the rate documented in the commitment letter.

(i) Commitments indicating a variable rate must provide a detailed breakdown of the component rates comprising the all-in rate. The commitment must also state the lender's underwriting interest rate, or the Applicant must submit a separate statement executed by the lender with an estimate of the interest rate as of the date of the statement.

(ii) The maximum rate allowed for a competitive application cycle is evaluated by the Director of the Department's division responsible for Credit Underwriting Analysis Reports and posted to the Department's web site prior to the close of the application acceptance period. Historically this maximum acceptable rate has been at or below the average rate for 30-year U.S. Treasury Bonds plus 400 basis points.

(B) Amortization Period. The Department generally requires an amortization of not less than 30 years and not more than 50 years or an adjustment to the amortization structure is evaluated and recommended. In non-Tax Credit transactions a lesser amortization period may be used if the Department's funds are fully amortized over the same period.

(C) Repayment Period. For purposes of projecting the DCR over a 30-year period for Developments with permanent financing structures with balloon payments in less than 30 years, the Underwriter will carry forward Debt Service calculated based on a full amortization and the interest rate stated in the commitment.

(D) Acceptable Debt Coverage Ratio Range. The acceptable Year 1 DCR range for all priority or foreclosable lien financing plus the Department's proposed financing falls between a minimum of 1.15 to a maximum of 1.35. HOPE VI and USDA Rural Development transactions may underwrite to a DCR less than 1.15 based upon documentation of acceptance from the lender.

(i) For Developments other than HOPE VI and USDA Rural Development transactions, if the DCR is less than the minimum, the recommendations of the Report are conditioned upon a reduced debt service and the Underwriter will make adjustments to the assumed financing structure in the order presented in subclauses (I) - (III) of this clause.

(I) A reduction of the interest rate or an increase in the amortization period for TDHCA funded loans;

(II) A reclassification of TDHCA funded loans to reflect grants, if permitted by program rules;

(III) A reduction in the permanent loan amount for non-TDHCA funded loans based upon the rates and terms in the permanent loan commitment letter as long as they are within the ranges in subparagraphs (A) and (B) of this paragraph.

(ii) If the DCR is greater than the maximum, the recommendations of the Report are conditioned upon an increase in the debt service and the Underwriter will make adjustments to the assumed financing structure in the order presented in subclauses (I) - (III) of this clause.

(I) A reclassification of TDHCA funded grants to reflect loans, if permitted by program rules;

(II) An increase in the interest rate or a decrease in the amortization period for TDHCA funded loans;

(III) An increase in the permanent loan amount for non-TDHCA funded loans based upon the rates and terms in the permanent loan commitment letter as long as they are within the ranges in subparagraphs (A) and (B) of this paragraph.

(iii) For Housing Tax Credit Developments, a reduction in the recommended Tax Credit allocation may be made based on the gap/DCR method described in subsection (c)(2) of this section.

(iv) Although adjustments in Debt Service may become a condition of the Report, future changes in income, expenses, and financing terms could allow for an acceptable DCR.

(5) Long Term Proforma. The Underwriter will create a 30-year operating proforma.

(A) The base year projection utilized is the Underwriter's Year 1 EGI, Year 1 operating expenses, and Year 1 NOI unless

the Applicant's Year 1 EGI, Year 1 total operating expenses, and Year 1 NOI are each within 5% of the Underwriter's estimates.

(B) A 3% annual growth factor is utilized for income and a 4% annual growth factor is utilized for expenses.

(C) Adjustments may be made to the Long Term Proforma if sufficient support documentation is provided by the Applicant. Support may include

(i) documentation with terms for Project-based Rental Assistance or Operating Subsidy;

(ii) a fully executed management contract with clear terms;

(iii) documentation prepared and signed by the Central Appraisal District (CAD) with jurisdiction over the Development indicating the appraisal methodology consistently employed by the CAD and a ten-year history, beginning with the Application year, of tax rates for each taxing district with jurisdiction over the Development; and

(iv) required reserve for replacement schedule prepared and signed by the proposed permanent lender or equity provider. In no instance will the reserve for replacement figure included in the Long Term Proforma be less than the minimum requirements as described in §1.37 of this title.

(e) Development Costs. The Development's need for permanent funds and, when applicable, the Development's Eligible Basis is based upon the projected total development costs. The Department's estimate of the total development cost will be based on the Applicant's project cost schedule to the extent that it can be verified to a reasonable degree of certainty with documentation from the Applicant and tools available to the Underwriter. For new construction Developments, the Underwriter's total cost estimate will be used unless the Applicant's total development cost is within 5% of the Underwriter's estimate. In the case of a rehabilitation Development, the Underwriter may use a lower tolerance level due to the reliance upon the PCA. If the Applicant's total development cost is utilized and the Applicant's line item costs are inconsistent with documentation provided in the Application or program rules, the Underwriter may make adjustments to the Applicant's total cost estimate.

(1) Acquisition Costs. The proposed acquisition price is verified with the fully executed site control document(s) for the entire proposed site.

(A) Excess Land Acquisition. Where more land is being acquired than will be utilized for the site and the remaining acreage is not being utilized as permanent green space, the value ascribed to the proposed Development will be prorated from the total cost reflected in the site control document(s). An appraisal or tax assessment value may be tools that are used in making this determination; however, the Underwriter will not utilize a prorated value greater than the total amount in the site control document(s).

(B) Identity of Interest Acquisitions.

(i) The acquisition will be considered an identity of interest transaction when an Affiliate of, a Related Party to, or any owner at any level of the Development Team

(I) is the current owner in whole or in part of the proposed property, or

(II) was the owner in whole or in part of the proposed property during any period within the 36 months prior to the first day of the Application Acceptance Period.

(ii) In all identity of interest transactions the Applicant is required to provide the additional documentation identified in §50.9(h)(7)(A) of this title to support the transfer price to be used in the underwriting analysis.

(iii) In no instance will the acquisition cost utilized by the Underwriter exceed

(I) the original acquisition cost listed in the submitted settlement statement or, if a settlement statement is not available, the original asset value listed in the most current audited financial statement for the identity of interest owner, or

(II) the "as-is" value conclusion in the submitted appraisal.

(C) Acquisition of Buildings for Tax Credit Properties. In order to make a determination of the appropriate building acquisition value, the Applicant will provide and the Underwriter will utilize an appraisal that meets the Department's Appraisal Rules and Guidelines as described in §1.34 of this title. The value of the improvements are the result of the difference between the as-is appraised value less the land value. The Underwriter may alternatively prorate the actual or identity of interest sales price based upon a lower calculated improvement value over the as-is value provided in the appraisal, so long as the resulting land value utilized by the Underwriter is not less than the land value indicated in the appraisal or tax assessment.

(2) Off-Site Costs. Off-Site costs are costs of development up to the site itself such as the cost of roads, water, sewer and other utilities to provide the site with access. All off-site costs must be well documented and certified by a Third Party engineer on the required application form.

(3) Site Work Costs. Project site work costs exceeding $7,500$9,000 per Unit must be well documented and certified by a Third Party engineer on the required application form. In addition, for Applicants seeking Tax Credits, documentation in keeping with §50.9(i)(6)(G) of this title will be utilized in calculating eligible basis.

(4) Direct Construction Costs. Direct construction costs are the costs of materials and labor required for the building or rehabilitation of a Development.

(A) New Construction. The Underwriter will use the Marshall and Swift Residential Cost Handbook and historical final cost certifications of all previous housing tax credit allocations to estimate the direct construction cost for a new construction Development. If the Applicant's estimate is more than 5% greater or less than the Underwriter's estimate, the Underwriter will attempt to reconcile this concern and ultimately identify this as a cost concern in the Report.

(i) The "Average Quality" multiple, townhouse, or single family costs, as appropriate, from the Marshall and Swift Residential Cost Handbook, based upon the details provided in the application and particularly site and building plans and elevations will be used to estimate direct construction costs. If the Development contains amenities not included in the Average Quality standard, the Department will take into account the costs of the amenities as designed in the Development.

(ii) If the difference in the Applicant's direct cost estimate and the direct construction cost estimate detailed in clause (i) of this subparagraph is more than 5%, the Underwriter shall also evaluate the direct construction cost of the Development based on acceptable cost parameters as adjusted for inflation and as established by historical final cost certifications of all previous housing tax credit allocations for:

(I) the county in which the Development is to be located, or

(II) if cost certifications are unavailable under subclause (I) of this clause, the uniform state service region in which the Development is to be located.

(B) Rehabilitation Costs. In the case where the Applicant has provided a PCA which is inconsistent with the Applicant's figures as proposed in the development cost schedule, the Underwriter may request a supplement executed by the PCA provider supporting the Applicant's estimate and detailing the difference in costs. If said supplement is not provided or the Underwriter determines that the reasons for the initial difference in costs are not well-documented, the Underwriter utilizes the initial PCA estimations in lieu of the Applicant's estimates.

(5) Contingency. All contingencies identified in the Applicant project cost schedule will be added to Contingency with the total limited to the guidelines detailed in this paragraph. Contingency is limited to a maximum of 5% of direct costs plus site work for new construction Developments and 10% of direct costs plus site work for rehabilitation Developments. For tax credit Developments, the percentage is applied to the sum of the eligible direct construction costs plus eligible site work costs in calculating the eligible contingency cost. The Applicant's figure is used by the Underwriter if the figure is less than 5%.

(6) Contractor Fee. Contractor fees are limited at a total of 14%. The percentage is applied to the sum of the direct construction costs plus site work costs. For tax credit Developments, the percentages are applied to the sum of the eligible direct construction costs plus eligible site work costs in calculating the eligible contractor fees. For Developments also receiving financing from TX-USDA-RHS, the combination of builder's general requirements, builder's overhead, and builder's profit should not exceed the lower of TDHCA or TX-USDA-RHS requirements.

(7) Developer Fee. Developer fee claimed must be proportionate to the work for which it is earned and consistent with §49.9(d)(6) of this title.

(A) For Tax Credit Developments, the development cost associated with developer fees and Development Consultant (also known as Housing Consultant) fees included in Eligible Basis cannot exceed 15% of the project's Total Eligible Basis less developer fees for developments proposing 50 units or more and 20% of the project's Total Eligible Basis less developer fees for developments proposing 49 units or less, as defined in the QAP.

(B) In the case of a transaction requesting acquisition Tax Credits

(i) the allocation of eligible developer fee in calculating rehabilitation/new construction Tax Credits will not exceed 15% of the rehabilitation/new construction basis less developer fees for developments proposing 50 units or more and 20% of the rehabilitation/new construction basis less developer fees for developments proposing 49 units or less, and

(ii) no developer fee attributable to an identity of interest acquisition of the Development will be included in Eligible Basis.

(C) For non-Tax Credit Developments, the percentage can be up to 15% but is based upon total development costs less the sum of the fee itself, land costs, the costs of permanent financing, excessive construction period financing described in paragraph (8) of this subsection, reserves, and any other identity of interest acquisition cost.

(8) Financing Costs. Eligible construction period financing is limited to not more than one year's fully drawn construction loan funds at the construction loan interest rate indicated in the commitment. Any excess over this amount is removed to ineligible cost and will not be considered in the determination of developer fee.

(9) Reserves. The Department will utilize the terms proposed by the syndicator or lender as described in the commitment letter(s) or the amount described in the Applicant's project cost schedule if it is within the range of two to six months of stabilized operating expenses less management fees plus debt service.

(10) Other Soft Costs. For Tax Credit Developments all other soft costs are divided into eligible and ineligible costs. Eligible costs are defined by Internal Revenue Code but generally are costs that can be capitalized in the basis of the Development for tax purposes. Ineligible costs are those that tend to fund future operating activities. The Underwriter will evaluate and accept the allocation of these soft costs in accordance with the Department's prevailing interpretation of the Internal Revenue Code. If the Underwriter questions the eligibility of any soft costs, the Applicant is given an opportunity to clarify and address the concern prior to removal from Eligible Basis.

(f) Developer Capacity. The Underwriter will evaluate the capacity of the Person(s) accountable for the role of the Developer to determine their ability to secure financing and successfully complete the Development. The Department will review financial statements, and personal credit reports for those individuals anticipated to guarantee the completion of the Development.

(1) Credit Reports. The Underwriter will characterize the Development as "high risk" if the Applicant, General Partner, Developer, anticipated Guarantor or Principals thereof have a credit score which reflects a 40% or higher potential default rate.

(2) Financial Statements of Principals. The Applicant, Developer, any principals of the Applicant, General Partner, and Developer and any Person who will be required to guarantee the Development will be required to provide a signed and dated financial statement and authorization to release credit information in accordance with the Department's program rules.

(A) Individuals. The Underwriter will evaluate and discuss financial statements for individuals in a confidential portion of the Report. The Development may be characterized as "high risk" if the Developer, anticipated Guarantor or Principals thereof is determined to have limited net worth or significant lack of liquidity.

(B) Partnerships and Corporations. The Underwriter will evaluate and discuss financial statements for partnerships and corporations in the Report. The Development may be characterized as "high risk" if the Developer, anticipated Guarantor or Principals thereof is determined to have limited net worth or significant lack of liquidity.

(C) If the Development is characterized as a high risk for either lack of previous experience as determined by the TDHCA division responsible for compliance or a higher potential default rate is identified as described in paragraph (1) or (2) of this subsection, the Report must condition any potential award upon the identification and inclusion of additional Development partners who can meet the Department's guidelines.

(g) Other Underwriting Considerations. The Underwriter will evaluate numerous additional elements as described in subsection (b) of this section and those that require further elaboration are identified in this subsection.

(1) Floodplains. The Underwriter evaluates the site plan, floodplain map, survey and other information provided to determine if

any of the buildings, drives, or parking areas reside within the 100-year floodplain. If such a determination is made by the Underwriter, the Report will include a condition that:

(A) The Applicant must pursue and receive a Letter of Map Amendment (LOMA) or Letter of Map Revision (LOMR-F); or

(B) The Applicant must identify the cost of flood insurance for the buildings and for the tenant's contents for buildings within the 100-year floodplain; or

(C) The Development must be designed to comply with the QAP, as proposed.

(2) The Underwriter will identify in the report any Developments funded or known and anticipated to be eligible for funding within one linear mile of the subject.

(3) Supportive Housing. The unique development and operating characteristics of Supportive Housing Developments may require special consideration in the following areas:

(A) Operating Income. The extremely-low-income tenant population typically targeted by a Supportive Housing Development may include deep-skewing of rents to well below the 50% AMI level or other maximum rent limits established by the Department. The Underwriter should utilize the Applicant's proposed rents in the Report as long as such rents are at or below the maximum rent limit proposed for the units and equal to any project based rental subsidy rent to be utilized for the Development.

(B) Operating Expenses. A Supportive Housing Development may have significantly higher expenses for payroll, management fee, security, resident support services, or other items than typical Affordable Housing Developments. The Underwriter will rely heavily upon the historical operating expenses of other Supportive Housing Developments provided by the Applicant or otherwise available to the Underwriter.

(C) DCR and Long Term Feasibility. Supportive Housing Developments may be exempted from the DCR requirements of subsection (d)(4)(D) of this section if the Development is anticipated to operate without conventional debt. Applicants must provide evidence of sufficient financial resources to offset any projected 15-year cumulative negative cash flows. Such evidence will be evaluated by the Underwriter on a case-by-case basis to satisfy the Department's long term feasibility requirements and may take the form of one or a combination of the following: executed subsidy commitment(s), set-aside of Applicant's financial resources, to be substantiated by an audited financial statement evidencing sufficient resources, and/or proof of annual fundraising success sufficient to fill anticipated operating losses. If either a set aside of financial resources or annual fundraising are used to evidence the long term feasibility of a Supportive Housing Development, a resolution from the Applicant's governing board must be provided confirming their irrevocable commitment to the provision of these funds and activities.

(D) Development Costs. For Supportive Housing that is styled as efficiencies, the Underwriter may use "Average Quality" dormitory costs from the Marshall & Swift Valuation Service, with adjustments for amenities and/or quality as evidenced in the application, as a base cost in evaluating the reasonableness of the Applicant's direct construction cost estimate for new construction Developments.

(h) Work Out Development. Developments that are underwritten subsequent to Board approval in order to refinance or gain relief from restrictions may be considered infeasible based on the guidelines in this section, but may be characterized as "the best available option" or "acceptable available option" depending on the circumstances and subject to the discretion of the Underwriter as long as the option analyzed and recommended is more likely to achieve a better financial outcome for the property and the Department than the status quo.

(i) Feasibility Conclusion. An infeasible Development will not be recommended for funding or allocation unless the Underwriter can determine a plausible alternative feasible financing structure and conditions the recommendations of the report upon receipt of documentation supporting the alternative feasible financing structure. A development will be characterized as infeasible if paragraph (1) or (2) of this subsection applies. The Development will be characterized as infeasible if one or more of paragraphs (3) - (5) of this subsection applies unless paragraph (6) of this subsection also applies.

(1) Inclusive Capture Rate. Defined in §1.33 of this title. The Underwriter will independently verify the inclusive capture rate. The Development

(A) is characterized as Rural, Elderly or Special Needs and the inclusive capture rate is above 75% for the total proposed units; or

(B) is not characterized as Rural, Elderly or Special Needs and the inclusive capture rate is above 25% for the total proposed units.

(C) Developments meeting the requirements of subparagraph (A) or (B) of this paragraph may avoid being characterized as infeasible if clause (i) or (ii) of this paragraph apply.

(i) Replacement Housing. The Development is comprised of Affordable Housing which replaces previously existing substandard Affordable Housing within the Primary Market Area as defined in §1.33 of this title on a Unit for Unit basis, and gives the displaced tenants of the previously existing substandard Affordable Housing a leasing preference.

(ii) Existing Housing. The Development is comprised of existing Affordable Housing which is at least 80% occupied and gives displaced existing tenants a leasing preference as stated in the submitted relocation plan.

(2) Deferred Developer Fee. Development requesting an allocation of tax credits cannot repay the estimated deferred developer fee, based on the Underwriter's recommended financing structure, from cashflow within the first 15 years of the long term proforma as described in subsection (d)(5) of this section.

(3) Restricted Market Rent. The Restricted Market Rent for units with rents restricted at 60% of AMGI is less than both the net Program Rent and Market Rent for units with rents restricted at or below 50% of AMGI unless the development proposes all restricted units with rents restricted at or below the 50% of AMGI level. The requirement in this section may be waived by the Executive Director of the Department on appeal if documentation is submitted by the Applicant to support unique circumstances of the market that would provide mitigation.

(4) Initial Feasibility. The Year 1 annual total operating expense divided by the Year 1 Effective Gross Income is greater than 65%.

(5) Long Term Feasibility. Any year in the first 15 years of the Long Term Proforma, as defined in subsection (d)(5) of this section, reflects

(A) negative Cash Flow; or

(B) a Debt Coverage Ratio below 1.15.

(6) Exceptions. Developments meeting the requirements of one or more of paragraphs (3) - (5) of this subsection may be re-characterized as feasible if one or more of subparagraphs (A) - (C) of this paragraph and subparagraph (D) of this paragraph apply.

(A) The Development will receive Project-based Section 8 Rental Assistance and a firm commitment with terms including contract rent and number of units is submitted at application.

(B) The Development will receive rental assistance in association with USDA-RD-RHS financing.

(C) The Development will be characterized as public housing as defined by HUD.

(D) The units not receiving Project-based Section 8 Rental Assistance or rental assistance in association with USDA-RD-RHS financing, or not characterized as public housing do not propose rents that are less than the Project-based Section 8, USDA-RD-RHS financing, or public housing units.

§1.33. Market Analysis Rules and Guidelines.

(a) General Provision. A Market Analysis prepared for the Department must evaluate the need for decent, safe, and sanitary housing at rental rates or sales prices that eligible tenants can afford. The analysis must determine the feasibility of the subject Property rental rates or sales price and state conclusions as to the impact of the Property with respect to the determined housing needs.

(b) Self-Contained. A Market Analysis prepared for the Department must allow the reader to understand the market data presented, the analysis of the data, and the conclusions derived from such data. All data presented should reflect the most current information available and the report must provide a parenthetical (in-text) citation or footnote describing the data source. The analysis must clearly lead the reader to the same or similar conclusions reached by the Market Analyst. All steps leading to a calculated figure must be presented in the body of the report.

(c) Market Analyst Qualifications. A Market Analysis submitted to the Department must be prepared and certified by an approved Qualified Market Analyst (§2306.67055). The Department will maintain an approved Market Analyst list based on the guidelines set forth in paragraphs (1) - (3) of this subsection.

(1) If not listed as approved by the Department, Market Analysts must submit subparagraphs (A) - (F) of this paragraph at least thirty days prior to the first day of the Application Acceptance Period for which the Market Analyst must be approved. To maintain status as an approved Qualified Market Analyst, updates to the items described in subparagraphs (A) - (C) of this paragraph must be submitted annually on the first Monday in February for review by the Department.

(A) Documentation of good standing in the State of Texas.

(B) A current organization chart or list reflecting all members of the firm who may author or sign the Market Analysis.

(C) Resumes for all members of the firm or subcontractors who may author or sign the Market Analysis.

(D) General information regarding the firm's experience including references, the number of previous similar assignments and time frames in which previous assignments were completed.

(E) Certification from an authorized representative of the firm that the services to be provided will conform to the Department's Market Analysis Rules and Guidelines, as described in this section, in effect for the application round in which each Market Analysis is submitted.

(F) A sample Market Analysis that conforms to the Department's Market Analysis Rules and Guidelines, as described in this section, in effect for the year in which the sample Market Analysis is submitted.

(2) During the underwriting process each Market Analysis will be reviewed and any discrepancies with the rules and guidelines set forth in this section may be identified and require timely correction. Subsequent to the completion of the application round and as time permits, staff or a review appraiser will re-review a sample set of submitted market analyses to ensure that the Department's Market Analysis Rules and Guidelines are met. If it is found that a Market Analyst has not conformed to the Department's Market Analysis Rules and Guidelines, as certified to, the Market Analyst will be notified of the discrepancies in the Market Analysis and will be removed from the approved Qualified Market Analyst list.

(A) In and of itself, removal from the list of approved Market Analysts will not invalidate a Market Analysis commissioned prior to the removal date and at least 90 days prior to the first day of the applicable Application Acceptance Period.

(B) To be reinstated as an approved Qualified Market Analyst, the Market Analyst must amend the previous report to remove all discrepancies or submit a new sample Market Analysis that conforms to the Department's Market Analysis Rules and Guidelines, as described in this section, in effect for the year in which the updated or new sample Market Analysis is submitted.

(3) The list of approved Qualified Market Analysts is posted on the Department's web site and updated within 72 hours of a change in the status of a Market Analyst.

(d) Market Analysis Contents. A Market Analysis for a rental Development prepared for the Department must be organized in a format that follows a logical progression and must include, at minimum, items addressed in paragraphs (1) - (12) of this subsection.

(1) Title Page. Include Property address or location, effective date of analysis, date report completed, name and address of person authorizing report, and name and address of Market Analyst.

(2) Letter of Transmittal. The date of the letter must be the date the report was completed. Include Property address or location, description of Property, statement as to purpose and scope of analysis, reference to accompanying Market Analysis report with effective date of analysis and summary of conclusions, date of Property inspection, name of persons inspecting subject Property, and signatures of all Market Analysts authorized to work on the assignment. Include a statement that the report preparer has read and understood the requirements of this section.

(3) Table of Contents. Number the exhibits included with the report for easy reference.

(4) Assumptions and Limiting Conditions. Include a description of all assumptions, both general and specific, made by the Market Analyst concerning the Property.

(5) Identification of the Property. Provide a statement to acquaint the reader with the Development. Such information includes street address, tax assessor's parcel number(s), and Development characteristics.

(6) Statement of Ownership. Disclose the current owners of record and provide a three year history of ownership for the subject Property.

(7) Secondary Market Area. All of the Market Analyst's conclusions specific to the subject Development must be based on only

one Secondary Market Area definition. The entire PMA, as described in paragraph (8) of this subsection, must be contained within the Secondary Market boundaries. The Market Analyst must adhere to the methodology described in this paragraph when determining the secondary market area (§2306.67055).

(A) The Secondary Market Area will be defined by the Market Analyst with

(i) size based on a base year population of no more than 250,000 people for Developments targeting families, and

(ii) boundaries based on

(I) major roads,

(II) political boundaries, and

(III) natural boundaries.

(IV) A radius is prohibited as a boundary definition.

(B) The Market Analyst's definition of the Secondary Market Area must be supported with a detailed description of the methodology used to determine the boundaries. If applicable, the Market Analyst must place special emphasis on data used to determine an irregular shape for the Secondary Market.

(C) A scaled distance map indicating the Secondary Market Area boundaries that clearly identifies the location of the subject Property must be included.

(8) Primary Market Area. All of the Market Analyst's conclusions specific to the subject Development must be based on only one Primary Market Area definition. The Market Analyst must adhere to the methodology described in this paragraph when determining the market area (§2306.67055).

(A) The Primary Market Area will be defined by the Market Analyst with

(i) size based on a base year population of no more than

(I) 100,000 people for Developments targeting the general population, and

(II) 250,000 people for Qualified Elderly Developments or Developments targeting special needs populations,

(ii) boundaries based on

(I) major roads,

(II) political boundaries, and

(III) natural boundaries.

(IV) A radius is prohibited as a boundary definition.

(B) The Market Analyst's definition of the Primary Market Area must be supported with a detailed description of the methodology used to determine the boundaries. If applicable, the Market Analyst must place special emphasis on data used to determine an irregular shape for the PMA.

(C) A scaled distance map indicating the Primary Market Area boundaries that clearly identifies the location of the subject Property and the location of all Local Amenities must be included.

(9) Market Information.

(A) For each of the defined market areas, identify the number of units for each of the categories in clauses (i) - (vi) of this subparagraph; the data must be clearly labeled as relating to either the PMA or the Secondary Market, if applicable

(i) total housing,

(ii) rental developments,

(iii) Affordable Housing,

(iv) Comparable Units,

(v) Unstabilized Comparable Units, and

(vi) proposed Comparable Units.

(B) Occupancy. The occupancy rate indicated in the Market Analysis may be used to support both the overall demand conclusion for the proposed Development and the vacancy rate assumption used in underwriting the Development (§1.32(d)(1)(C)). State the overall physical occupancy rate for the proposed housing tenure (renter or owner) within the defined market areas by

(i) number of Bedrooms,

(ii) quality of construction (class),

(iii) Targeted Population, and

(iv) Comparable Units.

(C) Absorption. State the absorption trends by quality of construction (class) and absorption rates for Comparable Units.

(D) Turnover. The turnover rate should be specific to the Targeted Population. The data supporting the turnover rate must originate from documented turnover rates from at least one of the following

(i) Comparable Units,

(ii) the defined PMA,

(iii) the defined Secondary Market, and

(iv) a Third Party data collection agency or demographer.

(E) Demand. Provide a comprehensive evaluation of the need for the proposed housing for each Unit type by number of Bedrooms proposed and rent restriction category within the defined market areas using the most current census and demographic data available.

(i) Demographics.

(I) Population. Provide population and household figures, supported by actual demographics, for a five-year period with the year of application as the base year.

(II) Target. If applicable, adjust the household projections for the Qualified Elderly or special needs population targeted by the proposed Development. State the target adjustment rate.

(III) Household Size-Appropriate. Adjust the household projections or target household projections, as applicable, for the appropriate household size for the proposed Unit type by number of Bedrooms proposed and rent restriction category based on 1.5 persons per Bedroom (round up). State the Household Size-Appropriate adjustment rate.

(IV) Income Eligible. Adjust the household size appropriate projections for income eligibility based on the income bands for the proposed Unit type by number of Bedrooms proposed and rent restriction category with

(-a-) the lower end of each income band calculated based on the lowest gross rent proposed divided by 35% for the general population and 40% for Qualified Elderly households, and

(-b-) the upper end of each income band equal to the applicable gross median income limit for the largest appropriate household size based on 1.5 persons per Bedroom (round up).

(-c-) State the Income Eligible adjustment rate.

(V) Tenure-Appropriate. Adjust the income-eligible household projections for tenure (renter or owner). State the Tenure-Appropriate adjustment rate.

(ii) Demand from Turnover. Apply the turnover rate as described in subparagraph (D) of this paragraph to the target, income-eligible, size-appropriate and tenure-appropriate households in the PMA projected at the proposed placed in service date.

(iii) Demand from Population Growth. Calculate the target, income-eligible, size-appropriate and tenure-appropriate household growth in the PMA for the twelve month period following the proposed placed in service date.

(iv) Demand from Secondary Market Area.

(I) Apply the turnover rate as described in subparagraph (D) of this paragraph to the target, income-eligible, size-appropriate and tenure-appropriate households in the Secondary Market Area projected at the proposed placed in service date.

(II) Only 25% of the demand calculated in subclause (I) of this clause may be included in the calculation of demand as described in paragraph(10)(D) of this subsection and for use in calculation of inclusive capture rate as described in paragraph (10)(E) of this subsection. In addition, 25% of the Comparable Units from Unstabilized Developments within the Secondary Market Area must be included in the calculation of inclusive capture rate.

(v) Demand from Other Sources. The source of additional demand and the methodology used to calculate the additional demand must be clearly stated. Calculation of additional demand must factor in the adjustments described in clause (i) of this subparagraph.

(10) Conclusions. Include a comprehensive evaluation of the subject Property, separately addressing each housing type and specific population to be served by the Development in terms of items in subparagraphs (A) - (G) of this paragraph. All conclusions must be consistent with the data and analysis presented throughout the Market Analysis.

(A) Unit Mix. Provide a best possible unit mix conclusion based on the occupancy rates by Bedroom type within the PMA and target, income-eligible, size-appropriate and tenure-appropriate household demand within the PMA.

(B) Rents. Provide a separate market rent and Restricted Market Rent conclusion for each proposed Unit type by number of Bedrooms and rent restriction category. Conclusions of Market Rent or Restricted Market Rent below the maximum net Program Rent limit must be well documented as the conclusions may impact the feasibility of the Development under §1.32(i) of this title.

(i) Comparable Units. Identify developments in the PMA with Comparable Units. In Primary Market Areas lacking sufficient rent comparables, it may be necessary for the Market Analyst to collect data from markets with similar characteristics and make quantifiable location adjustments. Provide a data sheet for each development consisting of

(I) Development name,

(II) address,

(III) year of construction and year of rehabilitation, if applicable,

(IV) property condition,

(V) population target,

(VI) unit mix specifying number of Bedrooms, number of baths, net rentable square footage and

(-a-) monthly rent, or

(-b-) sales price with terms, marketing period and date of sale,

(VII) description of concessions,

(VIII) list of unit amenities,

(IX) utility structure,

(X) list of common amenities, and

(XI) for rental developments only

(-a-) occupancy, and

(-b-) turnover.

(ii) Provide a scaled distance map indicating the Primary Market Area boundaries that clearly identifies the location of the subject Property and the location of the identified developments with Comparable Units.

(iii) Rent Adjustments. In support of the Market Rent and Restricted Market Rent conclusions, provide a separate attribute adjustment matrix for each proposed unit type by number of Bedrooms and rental restriction category.

(I) The Department recommends use of HUD Form 92273.

(II) A minimum of three developments must be represented on each attribute adjustment matrix.

(III) Adjustments for concessions must be included, if applicable.

(IV) Total adjustments in excess of 15% must be supported with additional narrative.

(V) Total adjustments in excess of 25% indicate the Units are not comparable for the purposes of determining Market Rent and Restricted Market Rent conclusions.

(C) Effective Gross Income. Provide rental income, secondary income, and vacancy and collection loss projections for the subject derived independent of the Applicant's estimates.

(D) Demand. State the target, income-eligible, size-appropriate and tenure-appropriate household demand by Unit type by number of Bedrooms proposed and rent restriction category (e.g. one-Bedroom units restricted at 50% of AMFI; two-Bedroom units restricted at 60% of AMFI) by summing the demand components applicable to the subject Development discussed in paragraph (9)(E)(ii) - (v) of this subsection. State the total target, income-eligible, size-appropriate and tenure-appropriate household demand by summing the demand components applicable to the subject Development discussed in paragraph (9)(E)(ii) - (v) of this subsection.

(E) Inclusive Capture Rate. The Market Analyst must calculate inclusive capture rates for the subject Development's proposed Unit types by number of Bedrooms and rent restriction categories, market rate Units, if applicable, and total Units. The Underwriter will adjust the inclusive capture rates to take into account any errors or omissions. To calculate an inclusive capture rate

(i) total

(I) the proposed subject Units,

(II) Comparable Units with priority, as defined in §49.9(d)(2) of this title, over the subject that have made application to TDHCA and have not been presented to the TDHCA Board for decision and

(III) Comparable Units in previously approved but Unstabilized Developments, and

(ii) divide by the total target, income-eligible, size-appropriate and tenure-appropriate household demand stated in subparagraph (D) of this paragraph.

(iii) Refer to §1.32(i) for feasibility criteria.

(F) Absorption. Project an absorption period for the subject Development to achieve Sustaining Occupancy. State the absorption rate.

(G) Market Impact. Provide an assessment of the impact the subject Development, as completed, will have on existing program Developments in the Primary Market (§2306.67055).

(11) Photographs. Provide labeled color photographs of the subject Property, the neighborhood, street scenes, and comparables. An aerial photograph is desirable but not mandatory.

(12) Appendices. Any Third Party reports including demographics relied upon by the Market Analyst must be provided in appendix form. A list of works cited including personal communications also must be provided, and the Modern Language Association (MLA) format is suggested.

(e) The Department reserves the right to require the Market Analyst to address such other issues as may be relevant to the Department's evaluation of the need for the subject Development and the provisions of the particular program guidelines.

(f) All Applicants shall acknowledge, by virtue of filing an application, that the Department shall not be bound by any such opinion or Market Analysis, and may substitute its own analysis and underwriting conclusions for those submitted by the Market Analyst.

§1.34. Appraisal Rules and Guidelines.

(a) General Provision. An appraisal prepared for the Department must conform to the Uniform Standards of Professional Appraisal Practice (USPAP) as adopted by the Appraisal Standards Board of the Appraisal Foundation.

(b) Self-Contained. An appraisal prepared for the Department must describe sufficient and adequate data and analyses to support the final opinion of value. The final value(s) must be reasonable, based on the information included. Any Third Party reports relied upon by the appraiser must be verified by the appraiser as to the validity of the data and the conclusions.

(c) Appraiser Qualifications. The qualifications of each appraiser are determined on a case-by-case basis by the Director of Real Estate Analysis or review appraiser, based upon the quality of the report itself and the experience and educational background of the appraiser. At minimum, a qualified appraiser must be appropriately certified or licensed by the Texas Appraiser Licensing and Certification Board.

(d) Appraisal Contents. An appraisal prepared for the Department must be organized in a format that follows a logical progression. In addition to the contents described in USPAP Standards Rule 2, the appraisal must include items addressed in paragraphs (1) - (12) of this subsection.

(1) Title Page. Include a statement identifying the Department as the client, acknowledging that the Department is granted full authority to rely on the findings of the report, and name and address of person authorizing report.

(2) Letter of Transmittal. Include reference to accompanying appraisal report, reference to all person(s) that provided significant assistance in the preparation of the report, date of report, effective date of appraisal, date of property inspection, name of person(s) inspecting the property, tax assessor's parcel number(s) of the site, estimate of marketing period, and signatures of all appraisers authorized to work on the assignment including the appraiser who inspected the property. Include a statement indicating the report preparer has read and understood the requirements of this section.

(3) Table of Contents. Number the exhibits included with the report for easy reference.

(4) Disclosure of Competency. Include appraiser's qualifications, detailing education and experience.

(5) Statement of Ownership of the Subject Property. Discuss all prior sales of the subject property which occurred within the past three years. Any pending agreements of sale, options to buy, or listing of the subject property must be disclosed in the appraisal report.

(6) Property Rights Appraised. Include a statement as to the property rights (e.g., fee simple interest, leased fee interest, leasehold, etc.) being considered. The appropriate interest must be defined in terms of current appraisal terminology with the source cited.

(7) Site/Improvement Description. Discuss the site characteristics including subparagraphs (A) - (E) of this paragraph.

(A) Physical Site Characteristics. Describe dimensions, size (square footage, acreage, etc.), shape, topography, corner influence, frontage, access, ingress-egress, etc. associated with the site. Include a plat map and/or survey.

(B) Floodplain. Discuss floodplain (including flood map panel number) and include a floodplain map with the subject clearly identified.

(C) Zoning. Report the current zoning and description of the zoning restrictions and/or deed restrictions, where applicable, and type of Development permitted. Any probability of change in zoning should be discussed. A statement as to whether or not the improvements conform to the current zoning should be included. A statement addressing whether or not the improvements could be rebuilt if damaged or destroyed, should be included. If current zoning is not consistent with the highest and best use, and zoning changes are reasonable to expect, time and expense associated with the proposed zoning change should be considered and documented. A zoning map should be included.

(D) Description of Improvements. Provide a thorough description and analysis of the improvements including size (net rentable area, gross building area, etc.), number of stories, number of buildings, type/quality of construction, condition, actual age, effective age, exterior and interior amenities, items of deferred maintenance, etc. All applicable forms of depreciation should be addressed along with the remaining economic life.

(E) Environmental Hazards. It is recognized appraisers are not experts in such matters and the impact of such deficiencies may not be quantified; however; the report should disclose any potential environmental hazards (e.g., discolored vegetation, oil residue, asbestos-containing materials, lead-based paint etc.) noted during the inspection.

(8) Highest and Best Use. Market Analysis and feasibility study is required as part of the highest and best use. The highest and

best use analysis should consider paragraph (7)(A) - (E) of this subsection as well as a supply and demand analysis.

(A) The appraisal must inform the reader of any positive or negative market trends which could influence the value of the appraised property. Detailed data must be included to support the appraiser's estimate of stabilized income, absorption, and occupancy.

(B) The highest and best use section must contain a separate analysis "as if vacant" and "as improved" (or "as proposed to be improved/renovated"). All four elements (legally permissible, physically possible, feasible, and maximally productive) must be considered.

(9) Appraisal Process. It is mandatory that all three approaches, Cost Approach, Sales Comparison Approach and Income Approach, are considered in valuing the property. If an approach is not applicable to a particular property an adequate explanation must be provided. A land value estimate must be provided if the cost approach is not applicable.

(A) Cost Approach. This approach should give a clear and concise estimate of the cost to construct the subject improvements. The source(s) of the cost data should be reported.

(i) Cost comparables are desirable; however, alternative cost information may be obtained from Marshall & Swift Valuation Service or similar publications. The section, class, page, etc. should be referenced. All soft costs and entrepreneurial profit must be addressed and documented.

(ii) All applicable forms of depreciation must be discussed and analyzed. Such discussion must be consistent with the description of the improvements.

(iii) The land value estimate should include a sufficient number of sales which are current, comparable, and similar to the subject in terms of highest and best use. Comparable sales information should include address, legal description, tax assessor's parcel number(s), sales price, date of sale, grantor, grantee, three year sales history, and adequate description of property transferred. The final value estimate should fall within the adjusted and unadjusted value ranges. Consideration and appropriate cash equivalent adjustments to the comparable sales price for subclauses (I) - (VII) of this clause should be made when applicable.

(I) Property rights conveyed.

(II) Financing terms.

(III) Conditions of sale.

(IV) Location.

(V) Highest and best use.

(VI) Physical characteristics (e.g., topography, size, shape, etc.).

(VII) Other characteristics (e.g., existing/proposed entitlements, special assessments, etc.).

(B) Sales Comparison Approach. This section should contain an adequate number of sales to provide the reader with a description of the current market conditions concerning this property type. Sales data should be recent and specific for the property type being appraised. The sales must be confirmed with buyer, seller, or an individual knowledgeable of the transaction.

(i) Sales information should include address, legal description, tax assessor's parcel number(s), sales price, financing considerations and adjustment for cash equivalency, date of sale, recordation of the instrument, parties to the transaction, three year sale history, complete description of the property and property rights conveyed, and discussion of marketing time. A scaled distance map clearly identifying the subject and the comparable sales must be included.

(ii) The method(s) used in the Sales Comparison Approach must be reflective of actual market activity and market participants.

(I) Sale Price/Unit of Comparison. The analysis of the sale comparables must identify, relate, and evaluate the individual adjustments applicable for property rights, terms of sale, conditions of sale, market conditions, and physical features. Sufficient narrative must be included to permit the reader to understand the direction and magnitude of the individual adjustments, as well as a unit of comparison value indicator for each comparable.

(II) Net Operating Income/Unit of Comparison. The net operating income statistics for the comparables must be calculated in the same manner. It should be disclosed if reserves for replacement have been included in this method of analysis. At least one other method should accompany this method of analysis.

(C) Income Approach. This section must contain an analysis of both the actual historical and projected income and expense aspects of the subject property.

(i) Market Rent Estimate/Comparable Rental Analysis. This section of the report should include an adequate number of actual market transactions to inform the reader of current market conditions concerning rental units. The comparables must indicate current research for this specific property type. The comparables must be confirmed with the landlord, tenant or agent and individual data sheets must be included. The individual data sheets should include property address, lease terms, description of the property (e.g., unit type, unit size, unit mix, interior amenities, exterior amenities, etc.), physical characteristics of the property, and location of the comparables. Analysis of the Market Rents should be sufficiently detailed to permit the reader to understand the appraiser's logic and rationale. Adjustment for lease rights, condition of the lease, location, physical characteristics of the property, etc. must be considered.

(ii) Comparison of Market Rent to Contract Rent. Actual income for the subject along with the owner's current budget projections must be reported, summarized, and analyzed. If such data is unavailable, a statement to this effect is required and appropriate assumptions and limiting conditions should be made. The contract rents should be compared to the market-derived rents. A determination should be made as to whether the contract rents are below, equal to, or in excess of market rates. If there is a difference, its impact on value must be qualified.

(iii) Vacancy/Collection Loss. Historical occupancy data and current occupancy level for the subject should be reported and compared to occupancy data from the rental comparables and overall occupancy data for the subject's Primary Market.

(iv) Expense Analysis. Actual expenses for the subject, along with the owner's projected budget, must be reported, summarized, and analyzed. If such data is unavailable, a statement to this effect is required and appropriate assumptions and limiting conditions should be made. Historical expenses should be compared to comparables expenses of similar property types or published survey data (e.g., IREM, BOMA, etc.). Any expense differences should be reconciled. Include historical data regarding the subject's assessment and tax rates and a statement as to whether or not any delinquent taxes exist.

(v) Capitalization. The appraiser should present the capitalization method(s) reflective of the subject market and explain the omission of any method not considered in the report.

(I) Direct Capitalization. The primary method of deriving an overall rate (OAR) is through market extraction. If a band of investment or mortgage equity technique is utilized, the assumptions must be fully disclosed and discussed.

(II) Yield Capitalization (Discounted Cash Flow Analysis). This method of analysis should include a detailed and supportive discussion of the projected holding/investment period, income and income growth projections, occupancy projections, expense and expense growth projections, reversionary value and support for the discount rate.

(10) Value Estimates. Reconciliation final value estimate is required.

(A) All appraisals shall contain a separate estimate of the "as vacant" market value of the underlying land, based upon current sales comparables. The appraiser should consider the fee simple or leased fee interest as appropriate.

(B) Appraisal assignments for new construction are required to provide an "as completed" value of the proposed structures. These reports shall provide an "as restricted with favorable financing" value as well as an "unrestricted market" value.

(C) Reports on Properties to be rehabilitated shall address the "as restricted with favorable financing" value as well as both an "as is" value and an "as completed" value. The appraiser should consider the fee simple or leased fee interest as appropriate.

(D) If required the appraiser must include a separate assessment of personal property, furniture, fixtures, and equipment (FF&E) and/or intangible items. If personal property, FF&E, or intangible items are not part of the transaction or value estimate, a statement to such effect should be included.

(11) Marketing Time. Given property characteristics and current market conditions, the appraiser(s) should employ a reasonable marketing period. The report should detail existing market conditions and assumptions considered relevant.

(12) Photographs. Provide good quality color photographs of the subject property (front, rear, and side elevations, on-site amenities, interior of typical units if available). Photographs should be properly labeled. Photographs of the neighborhood, street scenes, and comparables should be included. An aerial photograph is desirable but not mandatory.

(e) Additional Appraisal Concerns. The appraiser(s) must be aware of Department program rules and guidelines and the appraisal must include analysis of any impact to the subject's value.

§1.35. Environmental Site Assessment Rules and Guidelines.

(a) General Provisions. The Environmental Site Assessments (ESA) prepared for the Department should be conducted and reported in conformity with the standards of the American Society for Testing and Materials. The initial report should conform with the Standard Practice for Environmental Site Assessments: Phase I Assessment Process (ASTM Standard Designation: E1527-05). Any subsequent reports should also conform to ASTM standards and such other recognized industry standards as a reasonable person would deem relevant in view of the Property's anticipated use for human habitation. The environmental assessment shall be conducted by a Third Party environmental professional at the expense of the Applicant, and addressed to TDHCA as a User of the report (as defined by ASTM standards). Copies of reports provided to TDHCA which were commissioned by other financial institutions should address TDHCA as a co-recipient of the report, or letters from both the provider and the recipient of the report should be submitted extending reliance on the report to TDHCA. The ESA report should also include a statement that the person or company preparing the ESA report will not materially benefit from the Development in any other way than receiving a fee for performing the Environmental Site Assessment, and that the fee is in no way contingent upon the outcome of the assessment. The ESA report must contain a statement indicating the report preparer has read and understood the requirements of this section.

(b) In addition to ASTM requirements, the report must

(1) State if a noise study is recommended for a property in accordance with current HUD guidelines and identify its proximity to industrial zones, major highways, active rail lines, civil and military airfields, or other potential sources of excessive noise;

(2) Provide a copy of a current survey, if available, or other drawing of the site reflecting the boundaries and adjacent streets, all improvements on the site, and any items of concern described in the body of the environmental site assessment or identified during the physical inspection;

(3) Provide a copy of the current FEMA Flood Insurance Rate Map showing the panel number and encompassing the site with the site boundaries precisely identified and superimposed on the map.

(4) If the subject site includes any improvements or debris from pre-existing improvements, state if testing for asbestos containing materials (ACMs) would be required pursuant to local, state, and federal laws, or recommended due to any other consideration;

(5) If the subject site includes any improvements or debris from pre-existing improvements, state if testing for Lead Based Paint would be required pursuant to local, state, and federal laws, or recommended due to any other consideration;

(6) State if testing for lead in the drinking water would be required pursuant to local, state, and federal laws, or recommended due to any other consideration such as the age of pipes and solder in existing improvements; and

(7) Assess the potential for the presence of Radon on the property, and recommend specific testing if necessary.

(c) If the report recommends further studies or establishes that environmental hazards currently exist on the Property, or are originating off-site but would nonetheless affect the Property, the Development Owner must act on such a recommendation or provide a plan for either the abatement or elimination of the hazard. Evidence of action or a plan for the abatement or elimination of the hazard must be presented upon Application submittal.

(d) For Developments in programs that allow a waiver of the Phase I ESA such as a TX-USDA-RHS funded Development, the Development Owners are hereby notified that it is their responsibility to ensure that the Development is maintained in compliance with all state and federal environmental hazard requirements.

(e) Those Developments which have or are to receive first lien financing from HUD may submit HUD's environmental assessment report, provided that it conforms to the requirements of this subsection. Guidelines

§1.36. Property Condition Assessment.

(a) General Provisions. The objective of the Property Condition Assessment (the PCA) is to provide cost estimates for repairs, replacements, or new construction which are: immediately necessary; proposed by the developer; and expected to be required throughout the term of the regulatory period and not less than 30 years. The PCA prepared for the Department should be conducted and reported in conformity with the American Society for Testing and Materials "Standard

Guide for Property Condition Assessments: Baseline Property Condition Assessment Process (ASTM Standard Designation: E 2018)" except as provided for in subsections (b) and (c) of this section. The PCA must include discussion and analysis of the following:

(1) Useful Life Estimates. For each system and component of the property the PCA should assess the condition of the system or component, and estimate its remaining useful life, citing the basis or the source from which such estimate is derived.

(2) Code Compliance. The PCA should review and document any known violations of any applicable federal, state, or local codes. In developing the cost estimates specified herein, it is the responsibility of the Housing Sponsor or Applicant to ensure that the PCA adequately considers any and all applicable federal, state, and local laws and regulations which may govern any work performed to the subject property.

(3) Program Rules. The PCA should assess the extent to which any systems or components must be modified, repaired, or replaced in order to comply with any specific requirements of the housing program under which the Development is proposed to be financed, particular consideration being given to accessibility requirements, the Department's Housing Quality Standards, and any scoring criteria for which the Applicant may claim points.

(4) Cost Estimates for Repair and Replacement. It is the responsibility of the Housing Sponsor or Applicant to ensure that the PCA provider is apprised of all development activities associated with the proposed transaction and consistency of the total immediately necessary and proposed repair and replacement cost estimates with the development cost schedule submitted as an exhibit of the Application.

(A) Immediately Necessary Repairs and Replacement. Systems or components which are expected to have a remaining useful life of less than one year, which are found to be in violation of any applicable codes, which must be modified, repaired or replaced in order to satisfy program rules, or which are otherwise in a state of deferred maintenance or pose health and safety hazards should be considered immediately necessary repair and replacement. The PCA must provide a separate estimate of the costs associated with the repair, replacement, or maintenance of each system or component which is identified as being an immediate need, citing the basis or the source from which such cost estimate is derived.

(B) Proposed Repair, Replacement, or New Construction. If the development plan calls for additional repair, replacement, or new construction above and beyond the immediate repair and replacement described in subparagraph (A) of this paragraph, such items must be identified and the nature or source of obsolescence or improvement to the operations of the Property discussed. The PCA must provide a separate estimate of the costs associated with the repair, replacement, or new construction which is identified as being above and beyond the immediate need, citing the basis or the source from which such cost estimate is derived.

(C) Expected Repair and Replacement Over Time. The term during which the PCA should estimate the cost of expected repair and replacement over time must equal the longest term of any land use or regulatory restrictions which are, or will be, associated with the provision of housing on the property. The PCA must estimate the periodic costs which are expected to arise for repairing or replacing each system or component or the property, based on the estimated remaining useful life of such system or component as described in paragraph (1) of this subsection adjusted for completion of repair and replacement immediately necessary and proposed as described in subparagraphs (A) and (B) of this paragraph. The PCA must include a separate table of the estimated long term costs which identifies in each line the individual component of the property being examined, and in each column the year during the term in which the costs are estimated to be incurred and no less than 15 years. The estimated costs for future years should be given in both present dollar values and anticipated future dollar values assuming a reasonable inflation factor of not less than 2.5% per annum.

(b) If a copy of such standards or a sample report have been provided for the Department's review, if such standards are widely used, and if all other criteria and requirements described in this section are satisfied, the Department will also accept copies of reports commissioned or required by the primary lender for a proposed transaction, which have been prepared in accordance with:

(1) Fannie Mae's criteria for Physical Needs Assessments,

(2) Federal Housing Administration's criteria for Project Capital Needs Assessments,

(3) Freddie Mac's guidelines for Engineering and Property Condition Reports,

(4) TX-USDA-RHS guidelines for Capital Needs Assessment, or

(5) Standard and Poor's Property Condition Assessment Criteria: Guidelines for Conducting Property Condition Assessments, Multifamily Buildings.

(c) The Department may consider for acceptance reports prepared according to other standards which are not specifically named above in subsection (b) of this section, if a copy of such standards or a sample report have been provided for the Department's review, if such standards are widely used, and if all other criteria and requirements described in this section are satisfied.

(d) The PCA shall be conducted by a Third Party at the expense of the Applicant, and addressed to TDHCA as the client. Copies of reports provided to TDHCA which were commissioned by other financial institutions should address TDHCA as a co-recipient of the report, or letters from both the provider and the recipient of the report should be submitted extending reliance on the report to TDHCA. The PCA report should also include a statement that the person or company preparing the PCA report will not materially benefit from the Development in any other way than receiving a fee for performing the PCA. The PCA report must contain a statement indicating the report preparer has read and understood the requirements of this section. The PCA should be signed and dated by the Third Party report provider not more than six months prior to the date of the application.

§1.37. Reserve for Replacement Rules and Guidelines.

(a) General Provisions. The Department will require Developments to provide regular maintenance to keep housing sanitary, safe and decent by maintaining a reserve for replacement in accordance with §2306.186. The reserve must be established for each unit in a Development of 25 or more rental units, regardless of the amount of rent charged for the unit. The Department shall, through cooperation of its divisions responsible for asset management and compliance, ensure compliance with this section.

(b) The First Lien Lender shall maintain the reserve account through an escrow agent acceptable to the First Lien Lender to hold reserve funds in accordance with an executed escrow agreement and the rules set forth in this section and §2306.186.

(1) Where there is a First Lien Lender other than the Department or a Bank Trustee as a result of a bond indenture or tax credit syndication, the Department shall

(A) Be a required signatory party in all escrow agreements for the maintenance of reserve funds;

(B) Be given notice of any asset management findings or reports, transfer of money in reserve accounts to fund necessary repairs, and any financial data and other information pursuant to the oversight of the Reserve Account within 30 days of any receipt or determination thereof;

(C) Subordinate its rights and responsibilities under the escrow agreement, including those described in this subsection, to the First Lien Lender or Bank Trustee through a subordination agreement subject to its ability to do so under the law and normal and customary limitations for fraud and other conditions contained in the Department's standard subordination clause agreements as modified from time to time, to include subsection (c) of this section.

(2) The escrow agreement and subordination agreement, if applicable, shall further specify the time and circumstances under which the Department can exercise its rights under the escrow agreement in order to fulfill its obligations under §2306.186 and as described in this section.

(3) Where the Department is the First Lien Lender and there is no Bank Trustee as a result of a bond indenture or tax credit syndication or where there is no First Lien Lender but the allocation of funds by the Department and §2306.186 requires that the Department oversee a Reserve Account, the Owner shall provide at their sole expense for appointment of an escrow agent acceptable to the Department to act as Bank Trustee as necessary under this section. The Department shall retain the right to replace the escrow agent with another Bank Trustee or act as escrow agent at a cost plus fee payable by the Owner due to breach of the escrow agent's responsibilities or otherwise with 30 days prior notice of all parties to the escrow agreement.

(c) If the Department is not the First Lien Lender with respect to the Development, each Owner receiving Department assistance for multifamily rental housing shall submit on an annual basis within the Department's required Owner's Financial Certification packet a signed certification by the First Lien Lender including:

(1) Reserve for replacement requirements under the first lien loan agreement;

(2) Monitoring standards established by the First Lien Lender to ensure compliance with the established reserve for replacement requirements; and

(3) A statement by the First Lien Lender

(A) That the Development has met all established reserve for replacement requirements; or

(B) Of the plan of action to bring the Development in compliance with all established reserve for replacement requirements, if necessary.

(d) If the Development meets the minimum unit size described in subsection (a) of this section and the establishment of a Reserve Account for repairs has not been required by the First Lien Lender or Bank Trustee, each Owner receiving Department assistance for multifamily rental housing shall set aside the repair reserve amount as described in subsection (e)(1) - (3) of this section through the date described in subsection (f)(2) of this section through the appointment of an escrow agent as further described in subsection (b)(3) of this section.

(e) If the Department is the First Lien Lender with respect to the Development, each Owner receiving Department assistance for multifamily rental housing shall deposit annually into a Reserve Account through the date described in subsection (f)(2) of this section:

(1) For new construction Developments:

(A) Not less than $150 per unit per year for units one to five years old; and

(B) Not less than $200 per unit per year for units six or more years old.

(2) For rehabilitation Developments:

(A) An amount per unit per year established by the Department's division responsible for credit underwriting based on the information presented in a Property Condition Assessment in conformance with §1.36 of this title; and

(B) Not less than $300 per unit per year.

(3) For either new construction or rehabilitation Developments, the Owner of a multifamily rental housing Development shall contract for a third-party Property Condition Assessment meeting the requirements of §1.36 of this title and the Department will reanalyze the annual reserve requirement based on the findings and other support documentation.

(A) A Property Condition Assessment will be conducted:

(i) At appropriate intervals that are consistent with requirements of the First Lien Lender, other than the Department; or

(ii) At least once during each five-year period beginning with the 11th year after the awarding of any financial assistance for the Development by the Department, if the Department is the First Lien Lender or the First Lien Lender does not require a third-party Property Condition Assessment.

(B) Submission by the Owner to the Department will occur within 30 days of completion of the Property Condition Assessment and must include:

(i) The complete Property Condition Assessment;

(ii) First Lien Lender and/or Owner response to the findings of the Property Condition Assessment;

(iii) Documentation of repairs made as a result of the Property Condition Assessment; and

(iv) Documentation of adjustments to the amounts held in the replacement Reserve Account based upon the Property Condition Assessment.

(f) A Land Use Restriction Agreement or restrictive covenant between the Owner and the Department must require:

(1) The Owner to begin making annual deposits to the reserve account on the later of:

(A) The date that occupancy of the Development stabilizes as defined by the First Lien Lender or in the absence of a First Lien Lender other than the Department, the date the property is at least 90% occupied; or

(B) The date that permanent financing for the Development is completely in place as defined by the First Lien Lender or in the absence of a First Lien Lender other than the Department, the date when the permanent loan is executed and funded.

(2) The Owner to continue making deposits until the earliest of the following dates:

(A) The date on which the Owner suffers a total casualty loss with respect to the Development;

(B) The date on which the Development becomes functionally obsolete, if the Development cannot be or is not restored;

(C) The date on which the Development is demolished;

(D) The date on which the Development ceases to be used as a multifamily rental property; or

(E) The later of

(i) The end of the affordability period specified by the Land Use Restriction Agreement or restrictive covenant; or

(ii) The end of the repayment period of the first lien loan.

(g) The duties of the Owner of a multifamily rental housing Development under this section cease on the date of a change in ownership of the Development; however, the subsequent Owner of the Development is subject to the requirements of this section.

(h) If the Department is the First Lien Lender with respect to the Development or the First Lien Lender does not require establishment of a Reserve Account, the Owner receiving Department assistance for multifamily rental housing shall submit on an annual basis within the Department's required Owner's Financial Certification packet:

(1) Financial statements, audited if available, with clear identification of the replacement Reserve Account balance and all capital improvements to the Development within the fiscal year;

(2) Identification of costs other than capital improvements funded by the replacement Reserve Account; and

(3) Signed statement of cause for:

(A) Use of replacement Reserve Account for expenses other than necessary repairs, including property taxes or insurance;

(B) Deposits to the replacement Reserve Account below the Department's or First Lien Lender's mandatory levels as defined in subsections (c), (d) and (e) of this section; and

(C) Failure to make a required deposit.

(i) If a request for extension or waiver is not approved by the Department, Department action, including a penalty of up to $200 per dwelling unit in the Development and/or characterization of the Development as Materially Non-Compliant, as defined in §60.1 of this title, may be taken when:

(1) A Reserve Account, as described in this section, has not been established for the Development;

(2) The Department is not a party to the escrow agreement for the Reserve Account;

(3) Money in the Reserve Account

(A) Is used for expenses other than necessary repairs, including property taxes or insurance; or

(B) Falls below mandatory deposit levels;

(4) Owner fails to make a required deposit;

(5) Owner fails to contract for the third party Property Condition Assessment as required under subsection (e)(3) of this section; or

(6) Owner fails to make necessary repairs, as defined in subsection (k) of this section.

(j) On a case by case basis, the Department may determine that the money in the Reserve Account may:

(1) Be used for expenses other than necessary repairs, including property taxes or insurance, if:

(A) Development income before payment of return to Owner or deferred developer fee is insufficient to meet operating expense and debt service requirements; and

(B) The funds withdrawn from the Reserve Account are replaced as cashflow after payment of expenses, but before payment of return to Owner or developer fee is available.

(2) Fall below mandatory deposit levels without resulting in Department action, if:

(A) Development income after payment of operating expenses, but before payment of return to Owner or deferred developer fee is insufficient to fund the mandatory deposit levels; and

(B) Subsequent deposits to the Reserve Account exceed mandatory deposit levels as cashflow after payment of operating expenses, but before payment of return to Owner or deferred developer fee is available until the Reserve Account has been replenished to the mandatory deposit level less capital expenses to date.

(k) The Department or its agent may make repairs to the Development if the Owner fails to complete necessary repairs indicated in the submitted Property Condition Assessment or identified by physical inspection. Repairs may be deemed necessary if the Development is notified of the Owner's failure to comply with federal, state and/or local health, safety, or building code.

(1) Payment for necessary repairs must be made directly by the Owner or through a replacement Reserve Account established for the Development under this section.

(2) The Department or its agent will produce a Request for Bids to hire a contractor to complete and oversee necessary repairs.

(l) This section does not apply to a Development for which the Owner is required to maintain a Reserve Account under any other provision of federal or state law.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 21, 2006.

TRD-200606874
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Effective date: January 10, 2007
Proposal publication date: September 15, 2006
For further information, please call: (512) 475-4595

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TITLE 13. CULTURAL RESOURCES

PART 3. TEXAS COMMISSION ON THE ARTS

CHAPTER 31. AGENCY PROCEDURES

13 TAC §31.11

The Texas Commission on the Arts adopts new §31.11, relating to Gifts, Grants, and Donations, without changes to the proposed text as published in the November 17, 2006, issue of the *Texas Register* (31 TexReg 9435) and will not be republished.

This rule is needed to meet the requirements of Texas Government Code §2255.001, which requires that each state agency that has authority to accept gifts or grants have a rule establishing procedures to govern how such gifts and grants are handled by the agency. Elsewhere in this issue of the *Texas Register,* the Texas Commission on the Arts contemporaneously withdraws the emergency adoption of §31.11. The withdrawal is to take effect on January 10, 2007, same as the effective date of this adoption.

No comments were received regarding adoption of the new rule.

The new rule is adopted under the Texas Government Code §444.009, which provides that the commission may adopt rules to govern itself, its officers, and its committees and may prescribe the duties of its officers, consultants, and employees.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 21, 2006.

TRD-200606880
Ricardo Hernandez
Executive Director
Texas Commission on the Arts
Effective date: January 10, 2007
Proposal publication date: November 17, 2006
For further information, please call: (512) 936-6564

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CHAPTER 35 A GUIDE TO OPERATIONS, PROGRAMS AND SERVICES

The Texas Commission on the Arts adopts the repeal and replacement of §35.1 and §35.2, concerning A Guide to Operations, Programs and Services. The new rules are adopted with minor changes to the proposed text as published in the November 17, 2006, issue of the *Texas Register* (31 TexReg 9436). The text of the new rules will be republished. The repeals are adopted without changes from the proposal and will not be republished.

There are also minor changes made to the Adoption by Reference material.

The purpose of the repeal and replacement is to be consistent with changes to programs and services of the commission as outlined in the Texas Arts Plan as amended December 2006.

No comments were received regarding adoption of the rules.

13 TAC §35.1, §35.2

The repeal is adopted under the Government Code, §444.009, which provides the Texas Commission on the Arts with the authority to make rules and regulations for its government and that of its officers and committees.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 21, 2006.

TRD-200606881
Ricardo Hernandez
Executive Director
Texas Commission on the Arts
Effective date: January 10, 2007
Proposal publication date: November 17, 2006
For further information, please call: (512) 936-6564

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13 TAC §35.1, §35.2

The new sections are adopted under the Government Code, §444.009, which provides the Texas Commission on the Arts with the authority to make rules and regulations for its government and that of its officers and committees.

§35.1. A Guide to Operations.
The commission adopts by reference A Guide to Operations (revised December 2006). This document is published by and available from the Texas Commission on the Arts, P.O. Box 13406, Austin, Texas 78711. This document is also available online at www.arts.state.tx.us.

§35.2. A Guide to Programs and Services.
The commission adopts by reference A Guide to Programs and Services (revised December 2006). This document is published by and available from the Texas Commission on the Arts, P.O. Box 13406, Austin, Texas 78711. This document is also available online at www.arts.state.tx.us.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 21, 2006.

TRD-200606891
Ricardo Hernandez
Executive Director
Texas Commission on the Arts
Effective date: January 10, 2007
Proposal publication date: November 17, 2006
For further information, please call: (512) 936-6564

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TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 26. SUBSTANTIVE RULES APPLICABLE TO TELECOMMUNICATIONS SERVICE PROVIDERS

SUBCHAPTER R. PROVISIONS RELATING TO MUNICIPAL REGULATION AND RIGHTS-OF-WAY MANAGEMENT

16 TAC §§26.461, 26.463, 26.465

The Public Utility Commission of Texas (commission) adopts amendments to §26.461, relating to Access Line Categories, §26.463, relating to Calculation and Reporting of a Municipality's Base Amount, and §26.465, relating to Methodology for Counting Access Lines and Reporting Requirements for Certificated Telecommunications Providers with changes to the proposed text as published in the August 25, 2006 issue of the *Texas Register* (31 TexReg 6612). These amendments are necessary to address the impact of Senate Bill 5 (SB 5) on the commission's telecommunications right-of-way (ROW) rules under Subchapter R, Provisions Relating to Municipal Regulation and Rights-of-Way Management. The commission also redefines the term "access line" and the categories of access line in §26.461 of this title pursuant to Texas Local Government Code §283.003 and §26.465(m) of this title. Local Government Code §283.003 permits the commission to "modify the definition of "access line" and the categories of access lines as necessary to ensure competitive neutrality and nondiscriminatory application and to maintain consistent levels of compensation, as annually increased by growth in access lines and consumer price index, as applicable, to the municipalities."

Senate Bill 5 amended §283.002 of the Local Government Code by amending subsection (2) which expanded the definition of the term "certificated telecommunications provider" to include providers of voice service and adding subsection (7) which is a definition of the term "Voice service." Local Government Code §283.003 permits the commission to periodically modify the definition of access line to ensure competitive neutrality and nondiscriminatory application and to maintain consistent levels of compensation to the municipalities under the provisions of Subchapter R of this title. The commission is amending §26.461, §26.463 and §26.465 to implement the changes to Local Government Code Chapter 283 and pursuant to the authority granted the commission in Local Government Code §283.003. Senate Bill 5 also amended the Public Utility Regulatory Act (PURA) by adding §55.1735, relating to Charge for Pay Phone Access Line. The commission is also amending §26.465, relating to Methodology for Counting Access Lines and Reporting Requirements for Certificated Telecommunications Providers, to clarify that payphones lines are classified as access lines.

On September 14, 2006, the commission received written comments on §§26.461, 26.463 and 26.465 from Southwestern Bell Telephone, L.P., d/b/a AT&T Texas (AT&T Texas), Verizon Southwest, Bell Atlantic Communications, Inc., MCI Communications Services, Inc., d/b/a Verizon Business Services, and MCImetro Access Transmission Services, LLC d/b/a Verizon Access Transmission Services (collectively Verizon), the Coalition of Cities and the City of Houston (the Coalition), and Grande Communications Networks, Inc. (Grande). On October 6, 2006, reply comments were received from AT&T Texas, Verizon, the Coalition, Grande, and Worldcall Internet Inc. (Worldcall). On September 29, 2006, the commission held a public hearing attended by representatives from AT&T Texas, Verizon, the Coalition, Grande, and XO Communications (XO) and Time Warner Communications (Time Warner). Notice of the public hearing and the questions presented were published in the *Texas Register* on September 22, 2006. At the public hearing, the commenters discussed, among other issues, whether the language in §26.461(c)(1)(A)(iv) should be less restrictive so that software application-based providers, such as Vonage and Skype, would also be subject to municipal ROW access line fees. In this preamble the terms "software application-based," "application-based," "non-facilities based," "application voice-over-internet-protocol (VoIP)" and "over-the-top" VoIP providers have the same meaning: a service provider that provides VoIP service via a broadband connection that uses means other than owned facilities, unbundled network elements or leased facilities, or resale. Relevant comments at the public hearing are summarized herein to the extent they differed from the written comments. Parties' comments addressed specific subsections of the amended rule and are summarized below.

Comments on §26.461

§26.461(c)(1)

The definition of access line in proposed §26.461(c)(1) has been amended to incorporate the statutory language of §283.002(1) of the Local Government Code into subsection (c)(1)(A)(i) - (iii) and to add a new clause (iv) which reads "any other line not described in clauses (i), (ii) or (iii) of this subparagraph that provides voice service delivered by means of owned facilities, unbundled network elements or leased facilities, or resale."

1. Scope of SB 5 amendments

Some commenters suggested that the commission-proposed definition of access line is more restrictive than that contemplated by the SB 5 amendments to Local Government Code Chapter 283. The Coalition argued that prior to the SB 5 amendment, wireline Certificated Telecommunications Providers (CTPs) that provide VoIP service were already counting and filing access line reports. According to the Coalition, the intent of the "voice service" definition included in SB 5 could only have been to capture "over-the-top" providers if the voice service traveled through the public ROW. The Coalition pointed out that broadband services are not currently assessed a ROW fee and that adding VoIP service to the access line definition would not result in double counting of municipal access line fees.

The Coalition, commenting on proposed §26.461(c)(1)(A)(iv), suggested substituting the phrase "to end-use customers that allow such end-use customers to receive calls that originate through or on the public switched telephone network and/or that allow such end-use customers to send calls that terminate on the public switched telephone network" in place of the proposed language "delivered by means of owned facilities, unbundled network elements or leased facilities, or resale." The Coalition asserted that the proposed language is restrictive and would exclude "over-the-top" voice service providers, including those that use internet protocol technology such as Vonage, because they do not "provide service by means of owned facilities, unbundled network elements or leased facilities, or resale."

AT&T Texas, on the other hand, stated that the proposed definition of "access line" in §26.461(c)(1) captures the language and intent of §283.002(1) of the Local Government Code. AT&T Texas commented that the Coalition's and Grande's proposed language would clearly modify the definition of "access line" to include "interconnected VoIP providers" and that definition is not contained in the relevant SB 5 amendment.

Furthermore, AT&T Texas noted that it would be imprudent for the commission to implement a definition of access lines that included VoIP providers because of the difficulty of determining if a provider is actually using the ROW, how to locate providers and how to determine the correct location for the service. Similarly, Time Warner/XO in its comments at the public hearing,

expressed concern about including "over-the-top" providers in the definition of access line and the legal challenges that would almost certainly arise if such a definition were implemented by the commission. The legal challenges that Time Warner/XO was referring to was in essence a challenge of the commission's authority to adopt a rule that requires "over-the-top" VoIP providers to pay municipal ROW fees if such providers could demonstrate that their end-users are not in fact burdening a municipality's ROW.

Verizon argued that the proposed amendments appeared to implement SB 5, because municipal access line fees should only be assessed if a provider offers voice services that pass "through wireline facilities located at least in part in the public right-of way" *and* "the voice service is transmitted over an access line" that is owned, leased, or resold. Verizon also stated that the intent of the legislature with the passage of SB 5 was not to resolve all ROW issues, and the study of ROW access and fees, required by PURA §66.017 was intended to address all ROW issues in a comprehensive manner including the imposition of ROW fees on non-facilities based interconnected VoIP providers. At the public hearing, Time Warner concurred with Verizon on this point.

The commission held a public hearing on, among other issues, the question of whether the definition of "access line" should be expanded beyond that proposed to include voice service delivered to end-users by providers using other means, specifically software application-based providers over a broadband connection, also known as "over-the-top" providers. The commenters that participated in the hearing did not agree on whether "over-the-top" VoIP providers should be subject to Subchapter R of the commission's substantive rules. The Coalition and Grande contended that the plain language of Local Government Code §283.002 (2) and (7) mandate that "over-the-top" VoIP providers must pay compensation to the municipalities, and that the commission is obligated to adopt rule language implementing the SB 5 changes to accomplish that end. Verizon, AT&T Texas, Time Warner/XO argued that §26.461(c)(a) as proposed appropriately implements the SB 5 changes to Local Government Code Chapter 283.

The Coalition and Grande commented that the proposed definition of "access line" does not implement the broadly-worded definition of "voice service" the legislature enacted, but rather negates its effect. The Coalition contended that the legislature must have intended that all VoIP service providers be required to pay ROW fees since they provide "voice service" as defined in Chapter 283.

Commission response

The commission believes that the changes made by SB 5 to Local Government Code Chapter 283 empower the commission to require VoIP service providers that provide services by "means of owned facilities, unbundled network elements or leased facilities, or resale..." to pay municipal ROW access fees as proposed in §26.461(c)(1)(A)(iv). The commission agrees with the Coalition and Grande that the proposed definition of "access line" in §26.461(c)(1)(A)(iv) will prevent application of the rule to "over-the-top" VoIP service providers. The commission also agrees that the changes to Local Government Code Chapter 283 may empower the commission in some circumstances to require "over-the-top" VoIP service providers to assess and pay municipal ROW fees, particularly in the case where the geographic location of the end-user can be determined with a sufficient degree of certainty and the service is inherently non-nomadic. However, the commission disagrees with the contention that the legislative changes to Local Government Code Chapter 283 mandate that any "over-the-top" VoIP service provider currently serving end-users in Texas must be presently required to pay municipal ROW fees. Accordingly, for reasons discussed below, the commission adopts §26.461(c)(1) as proposed.

The commission recognizes that VoIP service is increasingly being adopted by end-users as a replacement for traditional telephone service. The amendment to §26.461(c)(1), as adopted, requires facilities-based VoIP providers that burden the rights-of-way to pay compensation to the municipalities, but does not require "over-the-top" VoIP providers to pay compensation to the municipalities at this time. However, in accordance with §283.003 of the Local Government Code, the commission plans to revisit the definition of "access line" again in the future, as appropriate, to determine whether technological changes, market conditions, level of consistent compensation to the municipalities, and other factors indicate that the service provided by "over-the-top" VoIP providers should be included in the definition of "access line." The commission notes that it is obligated under §283.003 of the Local Government Code and P.U.C. Substantive Rule §26.465(m) to review the need for modifying the definition of an access line at least once every three years.

The commission believes it has authority under the provisions of Local Government Code Chapter 283 to require any person that provides voice service utilizing access lines, as defined by the commission, to pay municipal ROW fees. Local Government Code §283.003 gives the commission the power to redefine the term "access line" periodically and the discretion to adopt a definition that is consistent with the elements listed in Local Government Code §283.003 and with legislative intent as expressed in the language of the entire statute. However, it is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme. The commission must consider the provisions of any statute as a whole and not in isolation.

Under Local Government Code Chapter 283 and under §§26.461 through 26.469 of this title, Provisions Relating to Municipal Regulations and Rights-of-Way Management, an "access line" is the unit of measurement employed to calculate the amount that must be paid by a CTP to a municipality for use of that municipality's rights-of-way. Local Government Code §283.002 contains a definition of "access line," but Local Government Code §283.003 permits the commission to "modify the definition of 'access line' and the categories of access lines as necessary to ensure competitive neutrality and nondiscriminatory application and to maintain consistent levels of compensation, as annually increased by growth in access lines and consumer price index, as applicable, to the municipalities." The commission recognizes that changes in Local Government Code Chapter 283 resulting from SB 5, and changes in technology, facilities, and competitive and market conditions warrant a redefinition of "access line" at the present time. The commission in this rulemaking proposed a new definition of "access line" that mirrored the definition in Local Government Code §283.002, but that also clarified that voice services provided by means of owned facilities, unbundled network elements or leased facilities, or resale, would now be counted as an "access line." Voice services provided by other means (*e.g.*, via satellite, via facilities neither owned, leased, by UNEs, nor resold) would not be counted as an "access line."

However, the criteria listed in Local Government Code §283.003 are not the beginning and end of the inquiry; they must be read

in the context of the overall statutory scheme. The commission notes that Local Government Code §283.001, State Policy; Purpose, indicates in part that the "purpose of this chapter is to establish a uniform method for compensating municipalities for the use of a public ROW by certificated telecommunications providers that "is administratively simple for municipalities and telecommunications providers..." and that is "consistent with the burdens on municipalities created by the incursion of certificated telecommunications providers into a public right-of-way...." Section 283.001 also indicates that other purposes of the statute include establishing a uniform method that is consistent with state and federal law, is competitively neutral, and is nondiscriminatory in its application. In reaching its decision to, for the time being, exclude the service provided by "over-the-top" providers from the definition of "access line," the commission considered all factors enumerated in the statute, as explained more fully in the following paragraphs.

The commission agrees with the Coalition and Grande that "over-the-top" VoIP service providers are providing "voice service" per the statutory definition. The commission does not agree that it is required in this rulemaking to adopt a definition of "access line" that ensures that all voice service providers must be required at present to pay municipal ROW fees, regardless of the other important, statutorily-mandated considerations mentioned above, *e.g.*, administrative simplicity.

As noted by AT&T Texas in its reply comments, if the commission were to adopt a definition of "access line" that included "over-the-top" VoIP service as a line to be counted, the commission would have to be sure that those types of providers were actually burdening the rights-of-way. The commission notes that many, if not all, "over-the-top" VoIP services are fully portable or "nomadic." That is, the end-users may use the service anywhere they can connect to a broadband connection. Even though an end-user's billing address may be inside the boundary of a particular municipality, the user may never, or rarely, make a voice call from or to that municipality. At present even the service provider is not able to ascertain with certainty the physical location of an end-user using "over-the-top" VoIP service.

The commission does not believe the state of technology today permits easy identification of the geographic location of the end-users of "over-the-top" VoIP services, and therefore declines to adopt a definition of "access line" that would compel such an end-user, even though she may live in a different state or country, to pay municipal ROW fees to a particular municipality. Again, the commission notes that technology is advancing, as always, and there may come a time in the near future when easy identification of such end-users is more practicable and administrable from the perspective of Subchapter R of the commission's substantive rules.

The commission does note that under current federal and state regulations end-users of "interconnected VoIP services" are required, or at least encouraged, to provide geographic location information to their service provider to facilitate 9-1-1 services. "Interconnected VoIP service" is defined at 47 C.F.R. §9.3 as a service that (1) enables real-time, two-way communications; (2) requires a broadband connection from the user's location; (3) requires Internet protocol-compatible customer premises equipment (CPE); and (4) permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network. The commission plans to study the implementation and facilitation of the federal and state 9-1-1 regulations, and other pertinent state and federal regulations, rules and laws in anticipation of its review of the definition of "access line" within the next three years. However, the commission notes that presently no administratively practical methodology exists to correlate 9-1-1 geographic location information of "over-the-top" VoIP end-users with the provisions of Subchapter R of the commission's substantive rules.

The commission notes that neither Local Government Code Chapter 283 nor the commission's rules includes any definition of "interconnected VoIP services" but, as mentioned above, there is a definition of the term in the Code of Federal Regulations at 47 C.F.R §9.3. The term "interconnected VoIP services" distinguishes between those VoIP service providers that, among other things, enable the end-user to make and receive calls to and from the public switched telephone network (PSTN) from those that do not. Local Government Code Chapter 283 and the commission's rules distinguish, for the purposes of this rulemaking, VoIP service providers that provide service by means of owned, leased, unbundled network elements or resale and those that provide service by other means. The FCC employs the term "interconnected VoIP service" to identify, among other things, those service providers that are subject to the FCC's 9-1-1 rules and those that are not. Whether a service provider permits its end-user to make calls to and from the PSTN is not determinative under Local Government Code Chapter 283 as to which service providers are required to pay municipal ROW fees. Thus, the use of the term "interconnected VoIP services" is informative to a degree, but not particularly relevant to this rulemaking proceeding.

Furthermore, the commission notes that the important public safety concerns that underlie federal and state regulations pertaining to 9-1-1 service are not a concern in this rulemaking. Obviously 9-1-1 service is critical to the nation's ability to respond to a host of crises, and the FCC's decision to extend 9-1-1 obligations to virtually all kinds of providers of voice communications is based on Congress's recognition of the need to protect and preserve life and property in a time of emergency. This rulemaking and the legislation behind it concern whether or not certain types of voice service providers must pay a fee to municipalities for the privilege of using the public ROW. Administration of the use of public ROWs has not yet been determined to be a matter of national importance such that Congress has recognized the need to establish a national methodology for assessing and collecting municipal ROW fees. The commission notes that if its concerns about identification of the geographic location of the end-user of "over-the-top" VoIP services can be adequately addressed by, for example, changes in technology or changes in federal regulations regarding such services, such changes will inform the commission's decision on whether the term "access line" should be redefined.

For the reasons discussed above, the commission declines to adopt the changes to §26.461(c)(1) suggested by the Coalition and Grande and adopts §26.461(c)(1) as proposed, which excludes "over-the-top" VoIP service providers.

2. Considerations of competitive neutrality, nondiscriminatory application, and revenue impact on municipalities

The Coalition expressed concern that as the number of non-certificated VoIP providers increases, the revenue to municipalities in the form of ROW fees will continue to decrease if these providers are not captured in this rule. The Coalition contended that an interconnected VoIP provider is essentially the same as a traditional telephone provider and that such providers should be paying access line fees because they cannot complete their

calls without using the public ROW. To achieve competitive neutrality, the Coalition argued that "non-certificated VoIP providers," including "over-the-top" providers, should be required to pay municipal ROW fees. The Coalition contended that by continuing to exclude these providers from payment of municipal access line fees, the commission will be permitting such VoIP providers to maintain a "competitive regulatory advantage." In its reply comments, Grande supported the Coalition's arguments regarding "over-the-top" providers. In its reply comments, AT&T Texas opposed the Coalition's position and stated that the intent of Local Government Code Chapter 283 was to establish a mechanism for assessing access line fees for the use of the public ROW, and this intent should not be overshadowed by issues related to competitive neutrality. AT&T Texas also advised the commission to "take a cautionary approach" with regard to deciding who should pay access line fees to make certain that only those providers that "burden the rights-of-way" are the ones required to pay access line fees.

Grande recommended that references to owned facilities, unbundled network elements or leased facilities, or resale in the proposed rule be deleted to ensure that voice service providers that use the public ROW are included in the definition and are deemed subject to applicable municipal access fees. In its reply comments, Grande suggested that the phrase "and that is provided by means of owned facilities, unbundled network elements, or resale" should be deleted in §§26.461(c)(1)(A)(i), 26.461(c)(1)(A)(iv), and 26.465(e)(10) to avoid creating an incentive for telecommunications providers to "separate organizational responsibility for physical facilities from organizational responsibility for customers with an eye toward avoidance of the fee in question." Grande stated that to achieve competitive neutrality the access line definition should capture all entities, including interconnected VoIP providers that provide voice services to end-use customers. The Coalition concurred with Grande.

Worldcall in its reply comments generally objected to the suggestion from Coalition and Grande to include VoIP service provided by "over-the-top" VoIP providers in the definition of access lines. Worldcall, an enhanced service provider, asserted that it does not provide "over-the-top" services like Vonage and that the current rules impose multiple access line fees on facilities (facility to Worldcall; facility to Worldcall's wholesale customer; facility to ultimate customer) and the proposal by Coalition and Grande only exacerbate the situation by adding yet another access line fee on the VoIP service that rides on these dedicated circuits.

Commission response

The commission notes that while "over-the-top" VoIP services seem to be growing in popularity, the level of public use of the service is presently small relative to all other types of voice service provisioning. The commission believes that the economic impact on Texas municipalities that results from its decision to exclude "over-the-top" VoIP providers at the present time is relatively insignificant. The commission has considered the foregoing as part of a broad review of the issue of the impact of the proposed rule on competitive neutrality. The commission believes any impact on competitiveness between CTPs will be minimal for the same reason. As noted by AT&T Texas in its reply comments, "concerns over how municipal access line fees are applied vis-à-vis competitors should not override the purpose of Chapter 283--establishing an access line fee regime for the municipalities' management of the public rights-of-way." The commission agrees and has determined that adopting the proposed changes to §26.461(c) results in a competitively neutral access line fee regime to the extent possible in light of the state of telecommunications technology today. The commission recognizes that technology will likely change over time and that if the use of "over-the-top" VoIP service continues to grow in popularity, the commission may need to revisit the definition of "access line" in the future.

Grande's suggestion that the definition of "access line" should be modified to exclude any reference to owned, leased, unbundled network elements, or resale is unwarranted. The commission points out that prior to the SB 5 amendments, Local Government Code Chapter 283 and Subchapter R of the commission's substantive rules imposed ROW fees on CTPs for access lines that enabled the provision of local exchange telephone service that are provided by means of owned or leased facilities, unbundled network elements or resale. SB 5 amendments did not alter this obligation on CTPs, it merely recognized a new class of providers, namely uncertificated providers of voice services who would now be subject to ROW fees under Local Government Code Chapter 283 if they provided voice communications through wireline facilities located at least in part in the public ROW. To delete the latter portion of the existing definition of "access line" contained in Local Government Code §283.002(1) and embodied in §26.461(c)(1)(A)(i), that reads "that is provided by means of owned facilities, unbundled network elements or leased facilities, or resale" as Grande suggests is unnecessary to accomplish what Grande recommends, namely that all voice service providers should be subject to provisions of Subchapter R of the commission's substantive rules. The commission believes that Grande's suggested language goes beyond the scope of the SB 5 amendments. As to Grande's concern about the creation of an incentive for companies that provide voice service that fall under the rule to change their business structure to take advantage of the exception, the commission believes that its decision to revisit its definition of "access line" within the next three years should alleviate such concerns. For these reasons, the commission declines to adopt the changes recommended by Grande.

The commission carefully considered the issue of whether limiting the application of ROW fees to providers that provide voice service by means of owned, leased, unbundled network elements gives "over-the-top" VoIP providers a competitive advantage over those entities that are required to pay ROW fees. The commission believes that given the *de minimus* usage of "over-the-top" VoIP at present, any concern that such providers will obtain any significant competitive advantage is unwarranted, particularly in light of the fact that the commission has stated that it has the statutory authority to require "over-the-top" VoIP providers to pay ROW fees and that it has the statutory obligation to review the definition of access line at least once every three years. On balance, issues of competitive neutrality do not outweigh other concerns such as feasibility of administration and adequacy of certainty that the end-user is actually burdening the public ROW. The commission will address the issue of competitive neutrality again if and when usage of "over-the-top" VoIP service grows to a significant level.

3. Relevance of recent FCC decisions regarding interconnected VoIP providers

Grande and the Coalition contended that the recent Federal Communications Commission (FCC) decisions imposing responsibility on "interconnected VoIP providers" with respect to E9-1-1, Communications Assistance for Law Enforcement Act

(CALEA), and the Universal Service Fund (USF) are informative, if not dispositive, of whether interconnected VoIP providers are included in the list of providers that use "a transmission path through the wireline communications system to provide service." Further, both Grande and the Coalition cited the FCC's definition of "interconnected VoIP providers" as services that must connect with the public switched telecommunications network (PSTN). Grande argued that payment of ROW fees is analogous to the other requirements recently extended to interconnected VoIP providers by the FCC.

Verizon, however, argued that ROW fees are *not* analogous to the fees assessed for E9-1-1 and USF purposes. Rather, Verizon suggested that ROW fees are best described as a property tax. Under this scenario, only telecommunications providers that own or lease facilities in the state should pay ROW fees. In support of this argument, Verizon cited portions of a letter filed by Representative Phil King, Chairman of the House Regulated Industries Committee in the predecessor rulemaking project, Project Number 31973. In its reply comments, AT&T Texas offered comments similar to those of Verizon.

Commission response

The commission agrees with Grande in its reply comments in this proceeding on the topic: "(i)t is important to remember that this is not a question of classifying VoIP as a telecommunications service or as an information service which debate has engendered such consternation in the telecommunications industry. This is purely a state government question revolving around fees for use of the public ROW." At this time, it is not clear whether the FCC will decide to occupy the entire field regarding all types of VoIP services. It has not done so as yet. As such, the commission believes it has the statutory authority to subject providers of voice services, as defined in Local Government Code §283.002, to the provisions of Subchapter R of the commission's substantive rules. For reasons previously discussed, the commission also believes that it has the discretion under Local Government Code §283.003 to exclude certain classes of voice service providers from the provisions of Subchapter R of the commission's substantive rules.

The commission disagrees with the Coalition and Grande that requiring service providers in Texas that use VoIP to deliver voice service to pay municipal ROW fees is analogous to the other requirements recently extended to interconnected VoIP providers by the FCC. First, as noted previously, Local Government Code Chapter 283 does not contain a definition of "interconnected VoIP service." Second, the FCC's decisions in E9-1-1, CALEA, USF orders were based in large part on the desirability of creating a national framework to ensure the provisions of each would be uniformly applied. This rulemaking concerns a state statute that addresses the practical administration of telecommunications service providers' use of municipal rights-of-way. The commission therefore declines to adopt the changes to the rule suggested by the Coalition and Grande.

§26.461(d)(1) and (2)

The proposed amendment to §26.461(d)(1) adds the phrase "any other line that provides residential voice service" under Category 1 lines. Likewise, the proposed amendment to §26.461(d)(2) would include any other line that provides non-residential voice service under Category 2 lines. Verizon offered language to clarify the proposed amendments to §26.461(d)(1) and (2) and suggested that the new phrases should read "any other *access* line ..." (emphasis added). The Coalition's reply comments supported this suggested change.

Commission response

The commission finds that Verizon's suggested revisions helps clarify the type of lines included in categories 1 and 2 and therefore adopts Verizon's suggested revisions in §26.461(d)(1) and (2).

Comments on §26.463

No comments were filed by the parties on the proposed amendments to §26.463.

Comments on §26.465

§26.465(c)(2)(E)

Proposed §26.465(c)(2)(E) adds a definition for voice service, which states that "(v)oice service, without regard to the delivery technology, switched or not, and including Internet protocol technology, shall constitute a single transmission path." Verizon suggested that the definition of a transmission path in §26.465(c)(2)(E) should be revised to include the phrase "provided through wireline facilities located at least in part in the public right-of-way." The Coalition's reply comments supported this change.

Commission response

The commission finds that Verizon's suggested revisions helps clarify the definition of voice service and is consistent with the definition of voice service in Local Government Code Chapter 283. The commission therefore adopts Verizon's suggested revisions to §26.465(c)(2)(E).

§26.465(d)(4)(A)

Under the proposed rule, §26.465(d)(4)(A) modifies the method in which access lines are counted, particularly with regard to voice service. Verizon stated that more clarification is needed in §26.465(d)(4)(A) to explain adequately how a facility of a CTP will be counted. Verizon proposed that this subsection be amended to read, "(t)he CTP shall count as one access line each separate physical facility or logical 56 kbps channel in the public ROW used to serve an end-use customer." In its reply comments, Verizon recognized some opposition to its suggested rule language and stated that it was not opposed to changing the phrase, "or logical 56 kbps channel," as this phrase may not be technologically neutral so long as the rule language ensures that CTPs are not assessed separate fees for the same physical facility. The Coalition cautioned that Verizon's suggested revisions would represent a departure from the commission's current rules. The Coalition posited that the commission has traditionally treated services as a 'proxy' for an access line. Therefore, multiple services can be provided over a single physical line and would be counted whether they are provided over one physical facility or not. The Coalition offered the following example: "(i)f a resident has multiple dial tone switched service, there are then multiple access lines to be counted-perhaps one access line is for a home office, another one for a fax machine, and yet a third is for a separate student line." Under the current rule, each of these lines would incur an access line fee. Grande, in its reply comments, supported the Coalition's position and stated that the commission's proposed amendment to §26.465(d)(4)(A) is consistent with the current rule language, which "treats each service as a separate transmission path."

Commission response

The commission declines to adopt Verizon's suggestion because proposed §26.465(d)(4)(A) is consistent with the commission's current rules on counting access lines and adequately explains the counting of voice service lines. Currently each individual switched service constitutes a single transmission path under §26.465(c)(2)(A) regardless of the number of switched services provided over the same physical facility. As the example offered by the Coalition demonstrates, a residential customer could subscribe to three different lines for his or her residence and each line would be counted as a separate access line for ROW purposes even though they are provided over the same physical facility. Similarly, proposed §26.465(d)(4)(A) counts each end-use customer provided voice service as one access line with the caveat that vertical features of a voice service or services bundled with the voice service would not be counted as a separate access line.

§26.465(d)(4(B)

The proposed amendment to §26.465(d)(4)(B) would require the CTP to use an end-use customer's billing address, if the physical address could not be determined, to decide whether or not municipal access line fees should be assessed. Verizon proposed the deletion of §26.465(d)(4)(B) if the intent of the commission is to include non-nomadic VoIP providers who must own or lease a physical facility in the public right-of-way and who would always know the physical location of an end-use customer. Verizon contended that the proposed language would capture CTPs that "own or lease a physical facility in the public ROW;" and would therefore exclude nomadic "over-the-top" VoIP providers such as Vonage. In contrast to Verizon's comments, Grande suggested that using the billing address for purposes of counting access lines is appropriate and should be retained in the proposed rule. In its reply comments, Verizon changed its position and did not object to §26.465(d)(4)(B), as proposed. The Coalition suggested that "billing addresses are susceptible to being manipulated at will by end-users by choosing where a billing is to be received." To avoid potential billing address manipulation, the Coalition suggested either deleting the billing address provision as proposed by Verizon or adding language that would permit carriers to use the billing address only in instances where the physical location could not be determined and when the registered location of the customer that is used for E9-1-1 purposes could not be determined. The Coalition expressed a preference for the latter suggestion.

Commission response

The commission declines to adopt the language proposed by the Coalition in light of the fact that Verizon has withdrawn its initial objection to proposed §26.465(d)(4)(B). Also, the proposed language is similar to the method already in use and embodied in §26.465(d)(2)(D), which attributes non-switched telecommunications services or private lines to the municipality identified by the CTP's billing systems when the physical location of the non-switched telecommunications service or private line cannot be identified. The commission concludes that reliance on a carrier's existing billing system to identify the location of end-use customer's voice service in the absence of a physical location would also minimize the administrative costs of implementing the SB 5 amendments.

§26.465(e)(10)

Proposed §26.465(e)(10) adds language that would include all lines that provide voice service delivered by means of owned facilities, unbundled network elements or leased facilities or resale that are not otherwise counted under §26.465(e). The Coalition believed that substantive changes to §26.465(e)(10) should be made to capture the intent of SB 5 more fully and to reduce the possibility of federal preemption. For the same reasons offered by the Coalition for its suggested changes to §26.465(c)(1)(A)(iv), the Coalition proposed that §26.465(e)(10) be rewritten to include "all lines that provide voice service to end-use customers that allow such end-use customers to receive calls that originate through or on the public switched telephone network and/or that allow such end-use customers to send calls that terminate on the public switched telephone network" instead of the phrase "delivered by means of owned facilities, unbundled network elements or leased facilities, or resale." Grande's reply comments supported the Coalition's suggested changes to this subsection.

Commission response

The commission has addressed the matter in its response to comments on the proposed changes to §26.461(c)(1) above. The changes to §26.465(e)(10) make clear that only voice service that is provided by means of owned facilities, unbundled network elements or leased facilities or resale is to be counted as an access line at the present time, consistent with the commission's response pertaining to §26.461(c)(1) above. Therefore the commission declines to make the changes suggested by Grande and the Coalition.

Registration of VoIP providers

The Coalition suggested that non-certificated telecommunications providers, including interconnected VoIP providers, should be required to register with the commission. The Coalition argued that this would not function as a barrier to entry, but rather, would assist the commission in enforcing access line reporting and payment to municipalities. The Coalition cited current procedures used by the State Comptroller and the Commission on State Emergency Communications (CSEC), which require an initial registration process. The State Comptroller uses this process for state sales tax purposes, whereas CSEC uses this process for E9-1-1 purposes. The Coalition suggested that its proposed registration process for ROW purposes could be based initially on E9-1-1 and other state required reports filed by "interconnected VoIP providers."

Commission response

The commission acknowledges that a CTP registration process for non-certificated voice providers might aid the commission and the municipalities in tracking non-certificated voice providers that are subject to SB 5. However, the commission notes that the SB 5 amendments to Local Government Code Chapter 283 are silent on the issue of registration of non-certificated providers and clearly do not require certification of VoIP providers. Moreover, establishing a registration process for non-certificated voice providers would contravene the policy in PURA §51.001(e) which requires the commission to take action to enhance competition in telecommunications markets by reducing the cost and burden of regulation and protecting markets that are not competitive. In any event, the commission determines that the registration issue is beyond the scope of this rulemaking project. Interested municipalities may rely on the E9-1-1 and other state required reports filed by most VoIP providers in Texas to track non-certificated voice providers subject to this section.

All comments, including any not specifically referenced herein, were fully considered by the commission. In adopting these sections, the commission makes other minor modifications for the purpose of clarifying its intent.

These amendments are adopted under the PURA §14.002, which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction. These amended sections are also adopted under the Texas Local Government Code §283.003, which permits the commission to periodically modify the definition of access line to ensure competitive neutrality and nondiscriminatory application and to maintain consistent levels of compensation to the municipalities. These amended sections are also adopted under Local Government Code §283.056(c)(3) and §283.058, which grant the commission the jurisdiction over municipalities, certificated telecommunications providers, and voice service providers, necessary to enforce Local Government Code Chapter 283 and to ensure that all other legal requirements are enforced in a competitively neutral, non-discriminatory, and reasonable manner. The amendments are necessary to implement Texas Local Government Code §283.002(2) and (7) and are also made pursuant to Local Government Code §283.003.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and Texas Local Government Code §§283.002(2) and (7), 283.003, 283.056, and 283.058.

§26.461. Access Line Categories.

(a) Purpose. This section establishes three competitively neutral, non-discriminatory categories of access lines for statewide use in establishing a uniform method for compensating municipalities for the use of a public right-of-way by certificated telecommunications providers (CTPs).

(b) Application. The provisions of this section apply to CTPs, as defined by subsection (c)(2) of this section, and to municipalities in the State of Texas.

(c) Definitions. The following words and terms when used in this subchapter, shall have the following meaning, unless the context clearly indicates otherwise.

(1) Access lines--

(A) means a unit of measurement representing

(i) each switched transmission path of the transmission media that is physically within a public right-of-way extended to the end-use customer's premises within the municipality, that allows the delivery of local exchange telephone services within a municipality, and that is provided by means of owned facilities, unbundled network elements or leased facilities, or resale; or

(ii) each termination point or points of a non-switched telephone or other circuit consisting of transmission media located within a public right-of-way connecting specific locations identified by, and provided to, the end-use customer for delivery of nonswitched telecommunications services within the municipality; or

(iii) each switched transmission path within a public right-of-way used to provide central office-based PBX-type services for systems of any number of stations within the municipality, and in that instance, one path shall be counted for every 10 stations served; or

(iv) any other line not described in clauses (i), (ii) or (iii) of this subparagraph that provides voice service delivered by means of owned facilities, unbundled network elements or leased facilities, or resale.

(B) The definition of "access line" may not be construed to include interoffice transport or other transmission media that do not terminate at an end-use customer's premises or to permit duplicate or multiple assessment of access line rates on the provision of a single service.

(2) Certificated telecommunications provider (CTP)--A person who has been issued a certificate of convenience and necessity, certificate of operating authority, or service provider certificate of operating authority by the commission to offer local exchange telephone service or a person who provides voice service.

(3) Public right-of-way--The area on, below, or above a public roadway, highway, street, public sidewalk, alley, waterway, or utility easement in which the municipality has an interest. The term does not include the airways above a right-of-way with regard to wireless telecommunications.

(4) Residential--Services provided at residential locations and primarily for residential (non-commercial) use. Definitions in the tariffs or price sheets of the provider, and the determinations made by provider for billing purposes shall control, unless the provider's definitions unreasonably depart from the general definition herein for purposes of avoidance of the payment of appropriate fees to the municipality.

(5) Non-Residential--All other locations not served by a residential line.

(6) Voice service--Voice communications services provided through wireline facilities located at least in part in the public right-of-way, without regard to the delivery technology, including Internet protocol technology. The term does not include voice service provided by a commercial mobile service provider as defined by 47 U.S.C. Section 332(d).

(d) Access line categories. There shall be three categories of access lines. The three categories shall be as follows:

(1) Category 1 shall include both analog and digital residential switched access lines and any other access line that provides residential voice service. It shall also include point-to-point private lines, whether residential or non-residential, only to the extent such lines provide burglar alarm or other similar security services.

(2) Category 2 shall include all analog and digital non-residential switched access lines and any other access line that provides non-residential voice service.

(3) Category 3 shall include all other point-to-point private lines, whether residential or non-residential, not otherwise included within category 1.

§26.463. Calculation and Reporting of a Municipality's Base Amount.

(a) Purpose. This section establishes a uniform method for determining a municipality's base amount and calculating the value of in-kind services provided to a municipality under an effective franchise agreement or ordinance by certificated telecommunications providers (CTPs), and sets forth relevant reporting requirements.

(b) Application. This section applies to all municipalities in the State of Texas.

(c) Definitions. The following words and terms when used in this subchapter, shall have the following meaning, unless the context clearly indicates otherwise.

(1) Base amount--The total amount of revenue received by the municipality from CTPs in franchise, license, permit, application, excavation, inspection, and other fees related to the use of a public

right-of-way in calendar year 1998 within the boundaries of the municipality. The base amount may include revenue from newly annexed areas, the value of in-kind services or facilities, or municipal fee rate escalation provisions for certain municipalities as prescribed in subsection (d) of this section.

(A) The base amount does not include pole rental fees, special assessments, and taxes of any kind, including ad valorem or sales and use taxes, or other compensation not related to the use of a public right-of-way.

(B) The base amount does not include compensation received from interexchange carriers, cable providers or wireless providers, who may be CTPs, but whose lines do not meet the definition of access line under §26.461 of this title (relating to Access Line Categories).

(2) Effective franchise agreement--A franchise agreement or ordinance that is adopted and effective by its own terms by January 12, 1999, or by mutual agreement of the parties has been held-over after its expiration date, without dispute, and the municipality and the CTP were in the process of developing a new agreement or ordinance.

(3) In-kind compensation.

(A) In-kind services--Services received by a municipality from a CTP during calendar year 1998 at either below cost or no cost as part of an effective franchise agreement.

(B) In-kind facilities--Facilities received by a municipality from a CTP before or during calendar year 1998 at either below cost or at no cost as part of an effective franchise agreement.

(4) Litigating municipality--A municipality that was involved in litigation relating to franchise fees with one or more CTPs during any part of calendar year 1998.

(5) Other compensation--Compensation not related to the use of a public right-of-way paid by a CTP to a municipality, including, but not limited to, fees paid to the municipality to obtain access to municipally-owned poles, ducts, conduits, buildings, and other facilities.

(6) Similarly sized municipality--

(A) For municipalities with a population less than 1000, a similarly sized municipality shall be another municipality with a population within 200 more or fewer persons than the reporting municipality's population, located in the same or adjacent county as the reporting municipality.

(B) For municipalities with a population greater than 1000, a similarly sized municipality shall be another municipality with a population within 20% of the reporting municipality's population, located in the same or adjacent county as the reporting municipality.

(C) Municipal population shall be determined using the January 1, 1999 population estimates of the Texas State Data Center.

(D) The reporting municipality and the similarly sized municipality shall have the same CTP with the greatest number of access lines.

(7) Special assessment--An assessment authorized for public improvements under the Local Government Code or the Transportation Code.

(d) Determination of a municipality's base amount. A municipality's base amount shall be the sum of all applicable revenue received from CTPs, including newly annexed areas, the value of in-kind compensation, and the value of any applicable escalation provisions in effective franchise agreements or ordinances, unless a municipality's base amount is determined under subsection (f) or (g) of this section.

(1) Revenue received. Payments received by a municipality from CTPs as compensation for calendar year 1998 usage of the public right-of-way.

(A) Payments received outside of calendar year 1998 may be included as revenue received only to the extent that these payments represent compensation for calendar year 1998 usage of a public right-of-way.

(B) Payments received in calendar year 1998 that do not represent compensation for calendar year 1998 usage of a public right-of-way shall be excluded.

(2) Escalation provisions. The municipality shall calculate and report its fee rate escalation amount that is known and measurable for calendar year 1999, that was specifically prescribed in effective agreements or ordinances, and add that escalation amount to the base amount calculation.

(3) In-kind compensation. In-kind services or facilities shall be valued at 1.0% of the base amount unless a municipality can establish before the commission that those services or facilities had a greater value in calendar year 1998. Municipalities requesting in-kind compensation above 1.0% of the base amount shall make a request consistent with subsections (e) and (j) of this section.

(e) Valuation of additional in-kind compensation. If a municipality wants to establish that the total value of in-kind compensation received from CTPs had a greater value in 1998 than 1.0% of the municipality's base amount, it must make a showing consistent with this subsection and meet the filing requirements of subsection (j) of this section.

(1) Telecommunications equipment. The municipality shall compute the 1998 value by dividing the original cost of the equipment by the term in years of the effective franchise agreement.

(2) Dark fiber. Where a municipality had the option to use the CTP's dark fiber as in-kind compensation in calendar year 1998, the municipality shall value the fiber only to the extent the municipality utilized it in calendar year 1998. The value shall be computed in accordance with paragraph (4) of this subsection. Where a CTP permanently transferred ownership of the dark fiber to the municipality as in-kind compensation before or during calendar year 1998, the value of the dark fiber shall be computed for its entire length in accordance with paragraph (1) of this subsection.

(3) Poles, ducts, and conduits. Where a municipality had the option to use the CTP's poles, ducts, and conduits as part of its in-kind compensation, it shall value those facilities only to the extent the municipality utilized them during calendar year 1998. The value of the poles, ducts and conduits shall be based upon reasonable annual rental fees charged or paid by other utilities for similar facilities. Where a municipality and a CTP have entered into a joint-use agreement for the use of poles, ducts, or conduits, no value shall be included in computing in-kind compensation for such use.

(4) Telecommunications service. The municipality shall value the telecommunications service it received as in-kind compensation by determining the fees paid by other municipalities for same or similar services, or through the average price charged in 1998 by three suppliers qualified to provide the service.

(5) All other facilities and services. The municipality shall perform a survey of suppliers for all other in-kind facilities and services it received in calendar year 1998, to establish true market values. The

municipality shall survey at least three suppliers for each facility or service it is valuing.

(f) Base amount for eligible municipalities.

(1) Eligible municipalities include municipalities in counties with a population of less than 25,000 on December 31, 1998, municipalities that did not have an effective franchise agreement or ordinance on January 12, 1999, and municipalities that were not in existence on January 12, 1999. A municipality that was incorporated prior to January 12, 1999 but received no compensation from CTPs for calendar 1998 use of the public right-of-way, shall also be considered an eligible municipality.

(A) If a municipality is located in more than one county, its eligibility shall be determined by the county containing the greatest number of its residents.

(B) County population shall be determined using the Texas State Data Center population estimates for January 1, 1999.

(2) The base amount for an eligible municipality shall, at the election of the governing body of the municipality, be equal to one of the following amounts:

(A) An amount not greater than the statewide average fee per line for each category of access line of the CTP with the greatest number of access lines in that municipality, multiplied by the total number of access lines in each category located within the boundaries of the municipality on December 31, 1998, for a municipality in existence on that date, or on the date of incorporation for a municipality incorporated after that date; or

(B) An amount not greater than the base amount determined for a similarly sized municipality in the same or an adjacent county in which the CTP with the greatest number of access lines in the municipality is the same for each municipality. The similarly sized municipality must have computed its base amount using methods other than this paragraph; or

(C) The total amount of revenue received by the municipality in franchise, license, permit, and application fees from all CTPs in calendar year 1998 consistent with the methodology prescribed under subsection (d)(1) of this section.

(g) Base amount for litigating municipality. The base amount for a litigating municipality that not later than December 1, 1999, repeals any ordinance subject to dispute in the litigation, voluntarily dismisses with prejudice any claims in the litigation for compensation, and agrees to waive any potential claim for compensation under any franchise agreement or ordinance expired or in existence on September 1, 1999, is, at the municipality's election, equal to one of the following amounts:

(1) An amount not to exceed the statewide average access line rate on a per category basis for the CTP with the greatest number of access lines in that municipality multiplied by the total number of access lines located within the boundaries of the municipality on December 31, 1998, including any newly annexed areas; or

(2) An amount not to exceed 21% of the total sales and use tax revenue received by the municipality pursuant to Texas Tax Code, Chapter 321. The sales and use tax revenue will be based on the calendar year 1998 report of taxes collected, as issued by the State Comptroller for a municipality. The amount does not include sales and use taxes collected under:

(A) Texas Transportation Code, Chapters 451, 452, 453, or 454 for a mass transit authority;

(B) the Development Corporation Act of 1979 (Article 5190.6, Vernon's Texas Civil Statutes), for a 4A or 4B Development Corporation;

(C) Texas Local Government Code, Chapters 334 and 335; and

(D) Texas Tax Code, Chapters 321, 322, and 323, for a special district, including health service, crime control, hospital, and emergency service districts.

(h) Books and records. Subject to request by the commission, a municipality shall provide sufficient records and documentation to substantiate its base amount calculation as prescribed in this chapter. A municipality shall maintain books and records relating to compensation received pursuant to Texas Local Government Code, Chapter 283, in accordance with generally accepted accounting principles (GAAP) and state and federal guidelines, and in a manner that allows for easy identification and reporting of right-of-way fees received from each CTP.

(i) Reporting procedures and requirements.

(1) Who shall file. The record-keeping and reporting requirements listed in this section shall apply to all municipalities in the State of Texas.

(2) Reporting. Unless otherwise specified, periodic reporting shall be consistent with this subsection and subsection (m) of this section.

(A) Initial reporting. A municipality shall file its base amount using the commission-approved *Form for Calculating Right-of-way Compensation* (FCRC), or the commission-approved *Program for Calculating Right-of-way Compensation* (PCRC), with the commission no later than December 1, 1999 under Project Number 20935, *Implementation of HB 1777*.

(B) Subsequent reporting.

(i) The commission may periodically require each municipality to file with the commission, on an as-needed basis, a report on municipal compensation. The report shall include all amounts received annually pursuant to this section and shall identify quarterly payments from each CTP.

(ii) The commission may request additional documentation if it determines a filing by the municipality is insufficient. If the commission requires additional information, the municipality shall respond and provide the needed documents to the commission within 30 days from the time the municipality receives the request.

(j) Reporting for additional in-kind compensation. This subsection applies only to a municipality valuing in-kind compensation at a level greater than 1.0% of its base amount, pursuant to subsection (e) of this section. The municipality maintains the burden of proof for establishing the reasonableness of its valuation. No later than December 1, 1999, the municipality shall file using the commission-approved *Form for Valuing In-kind Compensation Over 1.0%*. If the commission determines that the value of in-kind compensation is less than the value claimed by the municipality, the value of in-kind compensation for that municipality shall, on an interim basis, default to 1.0% of the base amount until the municipality makes a showing consistent with this section and subsection (e) of this section.

(k) Allocation of Base Amount. Not later than December 1, 1999, a municipality that wants to propose an allocation of the base amount over specific access line categories shall notify the commission of the desired allocation. The commission shall establish an allocation

of the base amount over the categories of access lines if a municipality does not file its proposed allocation by December 1, 1999.

(1) A municipality may request a modification of the commission's allocation not more than once every 24 months by notifying the commission and all affected CTPs in September of that year that the municipality wants to change the allocation for the next calendar year.

(2) A municipality's allocation shall be implemented unless, on complaint by an affected CTP, the commission determines that the allocation is not just and reasonable, is not competitively neutral, or is discriminatory.

(l) Late, insufficient, or incorrect filing.

(1) If a municipality fails to complete its base amount report by the date required by this section, the commission shall assume that the base amount for that municipality is $0.

(2) All commission-established rates and all compensation thereunder shall be applied prospectively from the date the CTPs timely implement the appropriate rates.

(3) A CTP shall not take more than 90 days to implement the rates established by the commission.

(m) Report attestation. All filings with the commission pursuant to this section shall be in accordance with the commission-approved FCRC or PCRC instructions, as appropriate. The filings shall be attested to by an officer or authorized representative of the municipality under whose direction the report is prepared or other official in responsible charge of the entity in accordance with §26.71(d) of this title (relating to General Procedures, Requirements and Penalties).

§26.465. Methodology for Counting Access Lines and Reporting Requirements for Certificated Telecommunications Providers.

(a) Purpose. This section establishes a uniform method for counting access lines within a municipality by category as provided by §26.461 of this title (relating to Access Line Categories), sets forth relevant reporting requirements, and sets forth certain reseller obligations under the Local Government Code, Chapter 283.

(b) Application. This section applies to all certificated telecommunications providers (CTPs) in the State of Texas.

(c) Definitions. The following words and terms when used in this section, shall have the following meaning, unless the context clearly indicates otherwise.

(1) Customer--The retail end-use customer.

(2) Transmission path--A path within the transmission media that allows the delivery of switched local exchange service or provides voice service.

(A) Each individual switched service shall constitute a single transmission path.

(B) Where services are offered as part of a bundled group of services, each switched service in that bundled group of services shall constitute a single transmission path.

(C) Services that constitute vertical features of a switched service, *e.g.*, call waiting, caller-ID, do not constitute a transmission path.

(D) Where a service or technology is channelized by the CTP and results in a separate switched path for each channel, each such channel shall constitute a single transmission path.

(E) Voice service provided through wireline facilities located at least in part in the public right-of-way, without regard to the delivery technology, switched or not, and including Internet protocol technology, shall constitute a single transmission path.

(3) Wireless provider--A provider of commercial mobile service as defined by §332(d), Communications Act of 1934 (47 U.S.C. §151 *et seq*.), Federal Communications Commission rules, and the Omnibus Budget Reconciliation Act of 1993 (Public Law 103-66).

(d) Methodology for counting access lines. A CTP's access line count shall be the sum of all lines counted pursuant to paragraphs (1), (2), (3), and (4) of this subsection, and shall be consistent with subsections (e), (f) and (g) of this section.

(1) Switched transmission paths and services.

(A) The CTP shall determine the total number of switched transmission paths, and shall take into account the number of switched services provided and the number of channels used where a service or technology is channelized.

(B) All switched services shall be counted in the same manner regardless of the type of transmission media used to provide the service.

(C) If the transmission path crosses more than one municipality, the line shall be counted in, and attributed to, the municipality where the end-use customer is located. Pursuant to Local Government Code §283.056(f), the per-access-line franchise fee paid by CTPs constitutes full compensation to a municipality for all of a CTP's facilities located within a public right-of-way, including interoffice transport and other transmission media that do not terminate at an end-use customer's premises, even though those types of lines are not used in the calculation of the compensation.

(2) Nonswitched telecommunications services or private lines.

(A) Each circuit used to provide nonswitched telecommunications services or private lines to an end-use customer, shall be considered to have two termination points, one on each customer location identified by the customer and served by the circuit.

(B) The CTP shall count nonswitched telecommunications services or private lines by totaling the number of terminating points within a municipality.

(C) A nonswitched telecommunications service shall be counted in the same manner regardless of the type of transmission media used to provide that service.

(D) A terminating point shall be counted in, and attributed to, the municipality where that point is located. In the event a CTP is not able to identify the physical location of the terminating point, that point shall be attributed to the municipality identified by the CTP's billing systems.

(E) Where dark (unlit) fiber is provided to an end-use customer who then lights it, the line shall be counted as a private line, by default, unless it is evident that it is used for providing switched services.

(3) Central office based PBX-type services. The CTP shall count one access line for every ten stations served.

(4) Voice service.

(A) The CTP shall count each end-use customer provided voice service as one access line. Services that constitute vertical features of a voice service, or are bundled with the voice service shall not be counted as a separate access line.

(B) In the event a CTP is unable to identify the physical location of an end-use customer utilizing voice service, but that end-use customer's billing address, as identified in the CTP's billing system, is located inside the boundaries of a municipality, the end-use customer's access line shall be attributed to the municipality where such billing address is located.

(e) Lines to be counted. A CTP shall count the following access lines:

(1) all access lines provided to a retail end-use customer;

(2) all access lines provided as a retail service to other CTPs and resellers for their own end-use;

(3) all access lines provided as a retail service to wireless telecommunication providers and interexchange carriers (IXCs) for their own end-use;

(4) all access lines a CTP provides as employee concession lines and other similar types of lines;

(5) all access lines provided as a retail service to a CTP's wireless and IXC affiliates for their own end-use, and all access lines provided as a retail service to any other affiliate for their own end-use;

(6) dark fiber, to the extent it is provided as a service or is resold by a CTP and shall exclude lines sold and resold by non-CTPs;

(7) any other lines meeting the definition of access line as set forth in §26.461 of this title;

(8) Lifeline lines;

(9) all retail pay telephone access lines; and

(10) all lines that provide voice service delivered by means of owned facilities, unbundled network elements or leased facilities, or resale that are not otherwise counted under paragraphs (1) - (9) of this subsection.

(f) Lines not to be counted. A CTP shall not count the following lines:

(1) all lines that do not terminate at an end-use customer's premises;

(2) lines used by providers who are not end-use customers such as CTP, wireless provider, or IXC for interoffice transport, or back-haul facilities used to connect such providers' telecommunications equipment;

(3) lines used by a CTP's wireless and IXC affiliates who are not end-use customers, for interoffice transport, or back-haul facilities used to connect such affiliates' telecommunications equipment;

(4) lines used by any other affiliate of a CTP for interoffice transport; and

(5) any other lines that do not meet the definition of access line as set forth in §26.461 of this title.

(g) Reporting procedures and requirements.

(1) Who shall file. The record keeping, reporting and filing requirements listed in this section or in §26.467 of this title (relating to Rates, Allocation, Compensation, Adjustments and Reporting) shall apply to all CTPs in the State of Texas.

(2) Initial reporting requirements.

(A) No later than January 24, 2000, a CTP shall file its access line count using the commission-approved *Form for Counting Access Line or Program for Counting Access Lines* with the commission. The CTP shall report the access line count as of December 31, 1998, except as provided in subparagraph (C) of this paragraph.

(B) A CTP shall not include in its initial report any access lines that are resold, leased, or otherwise provided to a CTP, unless it has agreed to a request from another CTP to include resold or leased lines as part of its access line report.

(C) A CTP that cannot file access line count as of December 31, 1998 shall file request for good cause exemption and shall file the most recent access line count available for December, 1999.

(D) A CTP shall not make a distinction between facilities and capacity leased or resold in reporting its access line count.

(h) Exemption. Any CTP that does not terminate a franchise agreement or obligation under an existing ordinance shall be exempted from subsequent reporting pursuant to §26.467 of this title unless and until the franchise agreement is terminated or expires on its own terms. Any CTP that fails to provide notice to the commission and the affected municipality by December 1, 1999 that it elects to terminate its franchise agreement or obligation under an existing ordinance, shall be deemed to continue under the terms of the existing ordinance. Upon expiration or termination of the existing franchise agreement or ordinance by its own terms, a CTP is subject to the terms of this section.

(i) Maintenance and location of records. A CTP shall maintain all records, books, accounts, or memoranda relating to access lines deployed in a municipality in a manner which allows for easy identification and review by the commission and, as appropriate, by the relevant municipality. The books and records for each access line count shall be maintained for a period of no less than three years.

(j) Proprietary or confidential information.

(1) The CTP shall file with the commission the information required by this section regardless of whether this information is confidential. For information that the CTP alleges is confidential and/or proprietary under law, the CTP shall file a complete list of the information that the CTP alleges is confidential. For each document or portion thereof claimed to be confidential, the CTP shall cite the specific provision(s) of the Texas Government Code, Chapter 552, that the CTP relies to assert that the information is exempt from public disclosure. The commission shall treat as confidential the specific information identified by the CTP as confidential until such time as a determination is made by the commission, the Attorney General, or a court of competent jurisdiction that the information is not entitled to confidential treatment.

(2) The commission shall maintain the confidentiality of the information provided by CTPs, in accordance with the Public Utility Regulatory Act (PURA) §52.207.

(3) If the CTP does not claim confidential treatment for a document or portions thereof, then the information will be treated as public information. A claim of confidentiality by a CTP does not bind the commission to find that any information is proprietary and/or confidential under law, or alter the burden of proof on that issue.

(4) Information provided to municipalities under the Local Government Code, Chapter 283, shall be governed by existing confidentiality procedures which have been established by the commission in compliance with PURA §52.207.

(5) The commission shall notify a CTP that claims its filing as confidential of any request for such information.

(k) Report attestation. All filings with the commission pursuant to this section shall be in accordance with §22.71 of this title (relating to Filing of Pleadings, Documents and Other Materials) and

§22.72 of this title (relating to Formal Requisites of Pleadings and Documents to Be Filed With the Commission). The filings shall be attested to by an officer or authorized representative of the CTP under whose direction the report is prepared or other official in responsible charge of the entity in accordance with §26.71(d) of this title (relating to General Procedures, Requirements and Penalties). The filings shall include a certified statement from an authorized officer or duly authorized representative of the CTP stating that the information contained in the report is true and correct to the best of the officer's or representative's knowledge and belief after inquiry.

(l) Reporting of access lines that have been provided by means of resold services or unbundled facilities to another CTP. This subsection applies only to a CTP reporting access lines under §26.467 of this title, that are provided by means of resold services or unbundled facilities to another CTP who is not an end-use customer. Nothing in this subsection shall prevent a CTP reporting another CTP's access line count from charging an appropriate, tariffed administrative fee for such service.

(m) Commission review of the definition of access line.

(1) Pursuant to the Local Government Code §283.003, not later than September 1, 2002, the commission shall determine whether changes in technology, facilities, or competitive or market conditions justify a modification of the adoption of the definition of "access line" provided by §26.461 of this title. The commission may not begin a review authorized by this subsection before March 1, 2002.

(2) As part of the proceeding described by paragraph (1) of this subsection, and as necessary after that proceeding, the commission by rule may modify the definition of "access line" as necessary to ensure competitive neutrality and nondiscriminatory application and to maintain consistent levels of compensation, as annually increased by growth in access lines and consumer price index, as applicable, to the municipalities.

(3) After September 1, 2002, the commission, on its own motion, shall make the determination required by this subsection at least once every three years.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 21, 2006.

TRD-200606870
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
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Proposal publication date: August 25, 2006
For further information, please call: (512) 936-7223

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 74. CURRICULUM REQUIREMENTS

The State Board of Education (SBOE) adopts amendments to §§74.1 - 74.3, 74.61, 74.63, and 74.64, concerning the curriculum requirements. The amendments to §§74.1 - 74.3, and 74.61 are adopted without changes to the proposed text as published in the October 6, 2006, issue of the *Texas Register* (31 TexReg 8320) and will not be republished. The amendments to §74.63 and §74.64 are adopted with changes to the proposed text published in the October 6, 2006, issue. The rules provide for curriculum requirements for school districts and outline graduation requirements. The adopted amendments incorporate changes in 19 TAC Chapter 74, Subchapters A and F, to reflect technical corrections, legislation from the regular session of the 79th Texas Legislature, 2005, and requirements of House Bill (HB) 1 from the Third Called Session, 2006.

In accordance with the Texas Education Code (TEC), §7.102(f), the SBOE approved this rule action for final adoption by a vote of more than two-thirds of its members to specify an effective date earlier than September 1, 2007. The effective date of the adopted amendments is 20 days after filing as adopted. The earlier effective date will allow the rule changes to become effective prior to the 2007-2008 school year. Although the rule changes will not be implemented until that school year, the earlier effective date provides school districts time to incorporate the changes locally.

19 TAC Chapter 74 is organized as follows: Subchapter A, Required Curriculum; Subchapter B, Graduation Requirements; Subchapter C, Other Provisions; Subchapter D, Graduation Requirements, Beginning with School Year 2001-2002; Subchapter E, Graduation Requirements, Beginning with School Year 2004-2005; and Subchapter F, Graduation Requirements, Beginning with School Year 2007-2008.

In February 2006, the SBOE initiated its review of 19 TAC Chapter 74. At that time, the SBOE directed Texas Education Agency staff to provide rule options for consideration at its April 2006 meeting. The proposed amendments approved for first reading and filing authorization by the SBOE during its April 2006 meeting were published in the May 19, 2006, issue of the *Texas Register* (31 TexReg 4142). Also in April 2006, the SBOE adopted the review of 19 TAC Chapter 74, finding that the reasons for initially adopting the rules continue to exist (31 TexReg 4241).

At its July 2006 meeting, the SBOE approved amendments to 19 TAC Chapter 74, Subchapters C, D, and E for second reading and final adoption. These adopted amendments were published in the August 4, 2006, issue of the *Texas Register* (31 TexReg 6212). Those adopted amendments took effect on August 8, 2006, and apply to the 2006-2007 school year.

In addition, the SBOE withdrew the proposed amendments to 19 TAC Chapter 74, Subchapters A and F, to consider additional amendments in accordance with HB 1, 79th Texas Legislature, Third Called Session, 2006. The withdrawal of 19 TAC Chapter 74, Subchapters A and F, was published in the August 4, 2006, issue of the *Texas Register* (31 TexReg 6201 and 31 TexReg 6202, respectively).

The SBOE approved modified proposed amendments to 19 TAC Chapter 74, Subchapters A and F, for first reading and filing authorization at its September 2006 meeting. These proposed amendments were published in the October 6, 2006, issue of the *Texas Register* (31 TexReg 8320).

19 TAC Chapter 74, Subchapter A

HB 1 requires the SBOE to include language requiring that one or more courses in the required curriculum include a research writing component. The adopted amendments in Subchapter A

include additional wording in 19 TAC §74.3(b)(5) to satisfy this requirement.

In addition, the adopted amendment to 19 TAC §74.1(a)(2)(B) adds language to the health curriculum requirement to include emphasis on the importance of proper nutrition and exercise, as required by Senate Bill 42. The adopted amendments to Subchapter A also incorporate technical corrections, including clarification to the languages other than English requirement in 19 TAC §74.3(b)(2)(J) to match corrections in Subchapters D - F.

The adopted amendment to 19 TAC §74.2 adds the word "reading" to English language arts under the required elementary curriculum, as directed by the SBOE in September 2006.

19 TAC Chapter 74, Subchapter F

HB 1 requires four years of mathematics and science in the recommended and distinguished achievement high school programs, beginning with students entering Grade 9 in school year 2007-2008. Adopted amendments in Subchapter F incorporate the mandated fourth year of mathematics and science as follows.

The adopted amendment in 19 TAC §74.61(i) removes provisional language regarding the fourth year of science to correspond with adopted amendments in 19 TAC §74.63 and §74.64.

The adopted amendments in §74.63 and §74.64 increase the number of credits required to complete the recommended and distinguished achievement high school programs to 26. This increase in the total number of required credits specified in subsection (a) does not decrease the number of elective credits specified in subsection (c).

Section 74.63 establishes graduation requirements under the Recommended High School Program. As proposed, the required four mathematics credits in the recommended program consisted of Algebra I, Algebra II, Geometry, and a fourth SBOE-approved mathematics course. At adoption, the SBOE approved the mathematics requirements proposed in subsection (b)(2), with the following changes. New subparagraph (A)(i) - (xii) was added to reference specific names of SBOE-approved mathematics courses, new subparagraph (B) was added to stipulate that the Mathematical Models with Applications course must be taken prior to Algebra II, and new subparagraph (C) was added to specify that the SBOE may designate additional courses to fulfill the mathematics credits required under the recommended program in the future.

Also within the recommended program, the proposal required that the four science credits consist of one credit in biology and two credits selected from Integrated Physics and Chemistry (IPC), a chemistry credit, or a physics credit plus one additional credit selected from the laboratory-based science courses listed in 19 TAC Chapter 112 of this title (relating to Texas Essential Knowledge and Skills for Science), with the addition of Engineering and Earth and Space Science. The proposal also stipulated that IPC could not be taken as the fourth science credit and must be taken before the senior year of high school. Further, the proposal specified that after the 2011-2012 school year, IPC would only be available to students on the minimum graduation plan. The proposal specified that beginning with students who enter Grade 9 beginning with the 2012-2013 school year, the four science credits under the recommended program must consist of a biology credit, a chemistry credit, a physics credit, and a credit selected from the laboratory-based science courses listed in 19 TAC Chapter 112, with the addition of Engineering and Earth and Space Science.

At adoption, the SBOE approved the science requirements proposed in subsection (b)(3), with the following changes. Subparagraph (C)(iii) was modified to add Principles of Technology I to the list of courses for which a physics credit can be earned by students entering Grade 9 beginning with the 2012-2013 school year to be consistent with adopted new subparagraph (A)(iii). New subparagraph (E) was added to specify that the SBOE may designate additional courses to fulfill the science credits required under the recommended program.

Section 74.64 establishes graduation requirements under the Distinguished Achievement Program. For the Distinguished Achievement Program, the proposal required that the four mathematics credits consist of Algebra I, Algebra II, Geometry, and a fourth SBOE-approved mathematics course for which Algebra II is a prerequisite. The SBOE approved the mathematics requirements for the distinguished plan with no changes from the proposal.

Also within the Distinguished Achievement Program, the proposal required that the four science credits consist of a biology credit, a chemistry credit, a physics credit, and a credit selected from the following laboratory-based courses: Earth and Space Science, Environmental Systems, Aquatic Science, Astronomy, Anatomy and Physiology of Human Systems, Advanced Placement (AP) Biology, International Baccalaureate (IB) Biology, AP Chemistry, IB Chemistry, AP Physics, IB Physics, AP Environmental Science, IB Environmental Systems, Scientific Research and Design, and Engineering. The SBOE approved the science requirements for the distinguished achievement program with no changes from the proposal.

In addition, the SBOE approved proposed amendments to Subchapter F that match amendments to Subchapters D and E as appropriate. These amendments include: clarification of the languages other than English requirement in subsection (b)(6) in §74.63 and §74.64; replacement of the term "tech prep articulated" with the correct term "advanced technical credit" in subsection (d)(3) in §74.64; and clarification of requirements to satisfy the technology applications credit in subsection (b)(10)(D) in §74.63 and §74.64. The SBOE made one additional change in §74.64(d)(3) at adoption in response to public comment requesting clarification about advanced measures relating to dual credit courses. The additional change clarifies that dual credit courses also include courses under local articulation agreements.

Following are comments received and corresponding responses regarding adoption of the proposed amendments.

Comment. Concerning Chapter 74, Subchapter F, Graduation Requirements, Beginning with School Year 2007-2008, comments were received from four individuals, 10 parents, three teachers, a science coordinator for Coppell Independent School District (ISD), the superintendent of Northside ISD, the executive director of fine arts for Katy ISD, the program directors for secondary mathematics and science from Aldine ISD, and a member of the Angleton ISD board of trustees in support of the proposed amendments. Comments placed an emphasis on the desire to keep as much flexibility for students as possible.

Response. The SBOE agreed with the desire to maintain flexibility for students and took action to ensure sufficient courses were available to provide opportunities for student choice with respect to course selection in completing the fourth year of mathematics and fourth year of science.

Comment. Concerning Chapter 74, Subchapter F, Graduation Requirements, Beginning with School Year 2007-2008, com-

ments were received from the Greater San Antonio Chamber of Commerce, the San Antonio Aerospace Industry Council, the San Antonio Manufacturers Association, and Alamo Aerospace Academies urging the SBOE to allow for flexibility in the courses that will satisfy the requirements for a fourth year of mathematics and a fourth year of science to include opportunities for students to learn through technical and hands-on instruction.

Response. The SBOE agreed with the desire to maintain flexibility for students and took action to ensure sufficient courses were available to provide opportunities for student choice with respect to course selection in completing the fourth year of mathematics and fourth year of science.

Comment. Concerning Chapter 74, Subchapter F, Graduation Requirements, Beginning with School Year 2007-2008, comments were received from an individual and the Texas Association of Secondary School Principals urging the SBOE to allow the fourth year of mathematics and science courses to be relevant to the needs of all students.

Response. The SBOE agreed and took action to ensure that graduation requirements provide opportunities for student choice with respect to course selection in completing the fourth year of mathematics and fourth year of science.

Comment. Concerning Chapter 74, Subchapter F, Graduation Requirements, Beginning with School Year 2007-2008, comments were received from six individuals, a superintendent, and two parents expressing their objection to requiring all students to take an additional mathematics and an additional science course. Concerns include an increase in the dropout rate as a result of the new requirements, lack of flexibility for students to pursue their individual interests, and undue stress for students.

Response. The SBOE disagreed and took action to determine the courses that would satisfy the requirements for a fourth year of mathematics and a fourth year of science. The additional graduation requirements are the result of state law that the SBOE must implement.

Comment. Concerning Chapter 74, Subchapter F, Graduation Requirements, Beginning with School Year 2007-2008, a comment was received from an individual asking the SBOE to keep the graduation requirements as they are.

Response. The SBOE disagreed and took action to determine the courses that would satisfy the requirements for a fourth year of mathematics and a fourth year of science. The additional graduation requirements are the result of state law that the SBOE must implement.

Comment. Concerning Chapter 74, Subchapter F, Graduation Requirements, Beginning with School Year 2007-2008, comments were received from an individual and two teachers in support of the proposal for course selection and sequencing submitted to the SBOE in September 2006 by Cypress-Fairbanks ISD.

Response. The SBOE agreed with the desire to maintain flexibility for students and took action to ensure sufficient courses were available to provide opportunities for student choice with respect to course selection in completing the fourth year of mathematics and fourth year of science.

Comment. Concerning Chapter 74, Subchapter F, Graduation Requirements, Beginning with School Year 2007-2008, comments were received from the Cy-Fair Minority Parents Association opposing the proposal submitted to the SBOE in September 2006 by Cypress-Fairbanks ISD and supporting the requirement that all students take Algebra I, Geometry, Algebra II, and Pre-calculus.

Response. The SBOE agreed with this requirement for the Distinguished Achievement Program but disagreed with it for the Recommended Program. The SBOE took action to require Algebra I, Geometry, Algebra II, and a fourth mathematics course for which Algebra II is a prerequisite for the Distinguished Achievement Program, but took action to allow for more flexibility for meeting the additional mathematics requirement under the Recommended Program. This will allow students to take Algebra I, Geometry, Algebra II, and Pre-calculus, but does not require it.

Comment. Concerning Chapter 74, Subchapter F, Graduation Requirements, Beginning with School Year 2007-2008, comments were received from four individuals, nine parents, a member of the Coppell ISD board of trustees, the superintendent of Northside ISD, and two teachers expressing concern that gifted/academically advanced students, in particular, would be penalized if required to take four years of mathematics and four years of science beyond high school credits they earned in middle school. Individuals expressed the desire for students to be allowed to earn credits toward high school in middle school and not be required to take four years of mathematics and four years of science in high school beyond those courses earned beginning in middle school.

Response. The SBOE agreed and took no action to require specified grade levels at which the four years of mathematics and four years of science must be taken, maintaining the provision for students to take courses for high school credit prior to entering high school.

Comment. Concerning Chapter 74, Subchapter F, Graduation Requirements, Beginning with School Year 2007-2008, a comment was received from the Greater Austin Chamber of Commerce Task Force on Mathematics and Science Education strongly endorsing the requirement that students receive mathematics and science instruction each year in Grades 9-12.

Response. The SBOE disagreed and took no action to require specified grade levels at which the four years of mathematics and four years of science must be taken, maintaining the provision for students to take courses for high school credit prior to entering high school.

Comment. Concerning Chapter 74, Subchapter F, Graduation Requirements, Beginning with School Year 2007-2008, a comment was received from an individual indicating that school districts should be required to offer a seven-period day in order to allow students to complete required courses while still having the ability to participate in activities such as athletics, band, and orchestra.

Response. The SBOE disagreed and took no action regarding this matter. State law does not grant either the agency or the SBOE statutory authority over scheduling of the school day.

Comment. Concerning Chapter 74, Subchapter F, Graduation Requirements, Beginning with School Year 2007-2008, a comment was received from the Texas Association of Secondary School Principals asking the SBOE to carefully consider the timeline for implementation of new graduation requirements.

Response. The SBOE took action to make amendments to graduation requirements effective beginning with students who enter Grade 9 in 2007-2008. This implementation date is required in state law.

Comment. Concerning Chapter 74, Subchapter F, Graduation Requirements, Beginning with School Year 2007-2008, a comment was received from an individual expressing support for enhanced mathematics and science curriculum for graduation, but concern that students who are inappropriately placed in higher level courses will hinder the educational progress of other students. The individual commented that the additional mathematics and science courses should be strongly encouraged and not mandated.

Response. The SBOE disagreed and took action to determine the courses that would satisfy the requirements for a fourth year of mathematics and a fourth year of science. The additional graduation requirements are the result of state law that the SBOE must implement.

Comment. Concerning Chapter 74, Subchapter F, Graduation Requirements, Beginning with School Year 2007-2008, a comment was received from the executive director of the Texas Music Educators Association encouraging SBOE members to protect electives and flexibility for students.

Response. The SBOE agreed and took action to increase the number of credits required for graduation under both the Recommended and Distinguished Achievement Programs to 26 in order to preserve the number of electives in a student's graduation program.

Comment. Concerning Chapter 74, Subchapter F, Graduation Requirements, Beginning with School Year 2007-2008, a comment was received from an individual asking the SBOE to evaluate elective courses to determine whether they can be used to satisfy the mathematics and science requirements.

Response. The SBOE disagreed and took no action to evaluate elective courses or add them to the list of courses that will satisfy the new mathematics and science requirements.

Comment. Concerning Chapter 74, Subchapter F, Graduation Requirements, Beginning with School Year 2007-2008, a comment was received from the executive director of the Ingenuity Center at the University of Texas at Tyler asking the SBOE to create a new course that focuses on developing students' capacities to design solutions to current and future problems.

Response. The SBOE agreed with the need to develop new courses and took action to allow for the development of additional mathematics courses in the future.

Comment. Concerning Chapter 74, Subchapter F, Graduation Requirements, Beginning with School Year 2007-2008, a comment was received from the executive director of the Education Career Alternatives Program expressing concerns over the testing irregularities and lack of test sites for potential candidates who are trying to take the TExES certification exam.

Response. The SBOE took no action relating to this matter as it was outside of the scope of the proposed amendments to 19 TAC Chapter 74.

Comment. Concerning Chapter 74, Subchapter F, Graduation Requirements, Beginning with School Year 2007-2008, comments were received from the president and the executive director of the Texas Association of School Personnel Administrators expressing concern over the impact the implementation of the new mathematics and science requirements will have on the existing shortage of certified teachers in these areas. Comments also included recommendations for addressing these concerns.

Response. The SBOE took no action on this matter as it was outside the scope of the proposed amendments to 19 TAC Chapter 74.

Comment. Concerning Chapter 74, Subchapter F, Graduation Requirements, Beginning with School Year 2007-2008, a comment was received from an individual asking the SBOE to improve mathematics and science teacher certification and provide intense and sustained professional development.

Response. The SBOE took no action on this matter as it was outside the scope of the proposed amendments to 19 TAC Chapter 74.

Comment. Concerning §74.63(b)(2), comments were received from two individuals, a teacher, the superintendent of Jayton-Girard ISD, and the director of mathematics for Coppell ISD in support of creating multiple paths to completing the fourth year of mathematics including Mathematical Models with Applications.

Response. The SBOE agreed and took action to allow Mathematical Models with Applications to count as one of the four years of mathematics under the Recommended Program.

Comment. Concerning §74.63(b)(2), a comment was received from three individuals and the coordinator of secondary mathematics in Cypress-Fairbanks ISD emphasizing that Mathematical Models with Applications is sufficiently rigorous for students on the Recommended Program and that the course will support student success in rigorous Algebra II courses.

Response. The SBOE agreed and took action to allow Mathematical Models with Applications to count as one of the four years of mathematics under the Recommended Program.

Comment. Concerning §74.63(b)(2), a comment was received from the Texas Business and Education Coalition asking the SBOE to phase-out Mathematical Models as a course for which students may receive credit toward the mathematics requirements.

Response. The SBOE disagreed and took action to allow Mathematical Models with Applications to count as one of the four years of mathematics under the Recommended Program.

Comment. Concerning §74.63(b)(2), a comment was received from two individuals and a member of the Coppell ISD board of trustees asking the SBOE not to make Algebra II a prerequisite for the fourth year mathematics courses.

Response. The SBOE agreed and took action to maintain language as proposed that does not require Algebra II as a prerequisite for the fourth mathematics course under the Recommended Program.

Comment. Concerning §74.63(b)(2), a comment was received from a teacher expressing concern that requiring more students to take upper level mathematics courses "waters down" the content in those courses.

Response. The SBOE disagreed and took action to determine the courses that would satisfy the requirements for a fourth year of mathematics and a fourth year of science. State law and rule require that all Texas Essential Knowledge and Skills for all courses be taught.

Comment. Concerning §74.63(b)(2), a comment was received from an individual suggesting that a consumer related personal finance mathematics course be included as an option for the fourth year of math.

Response. The SBOE disagreed and took action to determine the courses that would satisfy the requirements for a fourth year of math. This list of courses did not include a personal finance mathematics course. State law requires that personal financial literacy be taught in courses that count for economics credit toward graduation.

Comment. Concerning §74.63(b)(2), a comment was received from the regional director for elementary/secondary school services for ACT, Inc. providing evidence of the value of a fourth year of mathematics that goes beyond Algebra II.

Response. The SBOE agreed with this recommendation for the Distinguished Achievement Program but disagreed with it for the Recommended Program. The SBOE took action to maintain language as proposed that does not require Algebra II as a prerequisite for the fourth mathematics course under the Recommended Program. The SBOE took action to require that students graduating under the Distinguished Achievement Program complete a course beyond Algebra II for the fourth credit of mathematics.

Comment. Concerning §74.63(b)(2), a comment was received from the Texas Business and Education Coalition asking the SBOE to develop additional mathematics courses to be implemented by the 2009-2010 school year.

Response. The SBOE agreed with the need to develop new courses and took action to allow for the development of additional mathematics courses in the future.

Comment. Concerning §74.63(b)(2), comments were received from three teachers asking the SBOE to approve AP Computer Science as an option for the fourth year of mathematics under the Recommended Program.

Response. The SBOE agreed and took action to approve AP Computer Science as an option for the fourth year of mathematics under the Recommended Program.

Comment. Concerning §74.63(b)(2), comments were received from two teachers expressing their belief that computer science should be approved as an option for the fourth year of mathematics under the Recommended Program.

Response. The SBOE agreed and took action to approve AP Computer Science as an option for the fourth year of mathematics under the Recommended Program.

Comment. Concerning §74.63(b)(3), comments were received from three teachers expressing their belief that computer science should be approved as an option for the fourth year of science under the Recommended Program.

Response. The SBOE disagreed and took action to approve AP Computer Science as an option for the fourth year of mathematics under the Recommended Program.

Comment. Concerning §74.63(b)(3), comments were received from two individuals urging the SBOE to allow IPC to count toward graduation for gifted/academically advanced students who take these courses in middle school.

Response. The SBOE took action to allow IPC to count toward a science course required for graduation until 2012 under the Recommended Program. The SBOE took action to remove IPC from the Distinguished Achievement Program beginning with students who enter Grade 9 in the 2007-2008 school year.

Comment. Concerning §74.63(b)(3), a comment was received from an individual in support of removing IPC from the Recommended Program, but allowing the course to count toward graduation for students on the Minimum High School Program.

Response. The SBOE agreed and took action to phase out IPC as a course allowed for science credit toward graduation under the Recommended Program. The SBOE took no action regarding the Minimum Program and continues to allow IPC to count as a science credit under this program.

Comment. Concerning §74.63(b)(3), a comment was received from the Texas Business and Education Coalition asking the SBOE to accelerate the phase-out of IPC to first affect students who enter Grade 9 in 2009-2010.

Response. The SBOE disagreed and took action to phase out IPC under the Recommended Program beginning with students entering Grade 9 in the 2012-2013 school year. This course will continue to count toward a science credit for students who enter Grade 9 prior to 2012-2013 until these students complete their graduation requirements.

Comment. Concerning §74.63(b)(3), a comment was received from 26 teachers, the Charles A. Dana Center, and a curriculum director opposing the elimination of IPC as a course for high school graduation credit. Individuals expressed their belief in the merits of the IPC course and its importance in helping struggling students prepare for success in chemistry and physics.

Response. The SBOE disagreed and took action to phase out IPC under the Recommended Program beginning with students entering Grade 9 in the 2012-2013 school year. This course will continue to count toward a science credit for students who enter Grade 9 prior to 2012-2013 until these students complete their graduation requirements. The SBOE took action to remove IPC from the Distinguished Achievement Program beginning with students who enter Grade 9 in the 2007-2008 school year.

Comment. Concerning §74.64(b)(3), a comment was received from an individual inquiring about whether the decision to remove IPC has been made and when implementation would occur.

Response. The SBOE took action to phase out IPC under the Recommended Program beginning with students entering Grade 9 in the 2012-2013 school year. This course will continue to count toward a science credit for students who enter Grade 9 prior to 2012-2013 until these students complete their graduation requirements. The SBOE took action to remove IPC from the Distinguished Achievement Program beginning with students who enter Grade 9 in the 2007-2008 school year.

Comment. Concerning §74.64(b)(3), a comment was received from a science coordinator in Coppell ISD supporting the phase out of IPC.

Response. The SBOE agreed and took action to phase out IPC. Beginning with students who enter Grade 9 in 2012-2013, IPC will no longer count toward the required four years of science.

Comment. Concerning §74.63(b)(3)(C), comments were received from four teachers, a representative of the American Association of Physics Teachers, the Texas Business and Education Coalition, and the superintendent of Northside ISD requesting that the Principles of Technology course continue to be included as an option for satisfying the physics course requirement for graduation.

Response. The SBOE agreed and took action to allow Principles of Technology to continue to count as an option for satisfying the physics requirement under the Recommended Program.

The SBOE took action to remove Principles of Technology as an option for satisfying the physics requirement under the Distinguished Achievement Program.

Comment. Concerning §74.63(b)(3), a comment was received from director of public affairs with Texas Instruments encouraging the SBOE to include engineering as one of the approved course options for the fourth year of science.

Response. The SBOE agreed and took action to include an engineering course as an option for the fourth science credit under the Recommended and the Distinguished Achievement Programs.

Comment. Concerning §74.63(b)(3), comments were received from a teacher and the Texas Business and Education Coalition urging the SBOE to grant students credit for a fourth year of science for successful completion of the Infinity project or engineering through Project Lead the Way.

Response. The SBOE agreed that students should be able to earn credit for a fourth year of science for successful completion of an engineering course and took action to add engineering to the list of courses that will count for the fourth year of science. The SBOE directed the agency to begin work on development of Texas Essential Knowledge and Skills for engineering.

Comment. Concerning §74.63(b)(3), a comment was received from the Texas Section of the American Association of Physics Teachers recommending that the Recommended Program include biology, chemistry, physics, and a fourth course from any of the state approved science courses. The organization supported the proposal for the Distinguished Achievement Program and strongly recommended a rigorous advanced or capstone course. Additionally, the organization recommended that the Minimum Program include IPC, biology, and one additional state approved science course.

Response. The SBOE disagreed and took action to allow various courses to count for the fourth year of science, including a phase out of IPC under the Recommended Program. The SBOE agreed with the comments regarding the Distinguished Achievement Program and took action to approve language as proposed. The SBOE took no action regarding the Minimum High School Program.

Comment. Concerning §74.63(b)(3), a comment was received from a member of the Texas Earth Science Teachers Association advisory board making recommendations for revision of middle school science Texas Essential Knowledge and Skills.

Response. The SBOE took no action on this matter as it was outside the scope of the proposed amendments to 19 TAC Chapter 74.

Comment. Concerning §74.63(b)(3), a comment was received from a teacher inquiring about how adequate classrooms and labs will be built and sufficient numbers of physics teachers hired to be able to implement the additional science requirement.

Response. The additional graduation requirements are the result of state law that the SBOE must implement. The SBOE took action to determine the courses that would satisfy the requirements for a fourth year of mathematics and a fourth year of science. The SBOE does not have statutory authority over facilities or recruitment.

Comment. Concerning §74.63(b)(3), a comment was received from an individual expressing concern over the lack of science labs/classrooms including concern that labs do not meet safety standards. The comment included concern that science is underfunded at the campus level.

Response. The additional graduation requirements are the result of state law that the SBOE must implement. The SBOE took action to determine the courses that would satisfy the requirements for a fourth year of mathematics and a fourth year of science. The SBOE does not have statutory authority over facilities.

Comment. Concerning §74.63(b)(3)(A), a comment was received from the Texas Earth Science Teachers Association urging the SBOE to add Earth and Space science to the choices for the second and third science courses under the Recommended Program during the phase out of IPC. When IPC is phased out, the association recommends requiring an Earth and Space Systems.

Response. The SBOE disagreed and took action to allow various courses to count for the fourth year of science.

Comment. Concerning §74.64(d)(3), comments were received from an individual expressing concern that the wording in this subsection relating to dual credit courses could lead to misinterpretations by school districts and community colleges.

Response. The SBOE agreed and took action to add language to provide clarification about advanced measures relating to dual credit courses. The additional change clarifies that dual credit courses also include courses under local articulation agreements.

Comment. Concerning House Bill 1, a comment was received from an individual asking the SBOE to include or consult with industry professionals in the creation of vertical teams to ensure students are prepared to perform college-level course work.

Response. The SBOE took no action on this matter as it was outside the scope of the proposed amendments to 19 TAC Chapter 74.

SUBCHAPTER A. REQUIRED CURRICULUM

19 TAC §§74.1 - 74.3

The amendments are adopted under the Texas Education Code, §7.102(c)(4), which authorizes the SBOE to establish curriculum and graduation requirements; and §28.002, which authorizes the SBOE to by rule designate subjects constituting a well-balanced curriculum and to require each district to provide instruction in the essential knowledge and skills at appropriate grade levels.

The amendments implement the Texas Education Code, §§7.102(c)(4), 28.002, and 28.025.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 20, 2006.

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Cristina De La Fuente-Valadez
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Proposal publication date: October 6, 2006
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SUBCHAPTER F. GRADUATION REQUIREMENTS, BEGINNING WITH SCHOOL YEAR 2007 - 2008

19 TAC §§74.61, 74.63, 74.64

The amendments are adopted under the Texas Education Code, §7.102(c)(4), which authorizes the SBOE to establish curriculum and graduation requirements; §28.002, which authorizes the SBOE to by rule designate subjects constituting a well-balanced curriculum and to require each district to provide instruction in the essential knowledge and skills at appropriate grade levels; and §28.025(a), which authorizes the SBOE to by rule determine curriculum requirements for the minimum, recommended, and advanced high school programs that are consistent with §28.002.

The amendments implement the Texas Education Code, §§7.102(c)(4), 28.002, and 28.025(a).

§74.63. Recommended High School Program.

(a) Credits. A student must earn at least 26 credits to complete the Recommended High School Program.

(b) Core Courses. A student must demonstrate proficiency in the following:

(1) English language arts--four credits. The credits must consist of English I, II, III, and IV (English I for Speakers of Other Languages and English II for Speakers of Other Languages may be substituted for English I and II only for immigrant students with limited English proficiency).

(2) Mathematics--four credits.

(A) The credits must consist of Algebra I, Algebra II, and Geometry. After successful completion of Algebra I, Geometry, and Algebra II, a student may select the fourth required credit from any of the following courses, except as provided in subparagraph (B) of this paragraph:

(i) Precalculus;

(ii) Independent Study in Mathematics;

(iii) Advanced Placement (AP) Statistics;

(iv) AP Calculus AB;

(v) AP Calculus BC;

(vi) AP Computer Science;

(vii) International Baccalaureate (IB) Mathematical Studies Subsidiary Level;

(viii) IB Mathematical Methods Subsidiary Level;

(ix) IB Mathematics Higher Level;

(x) IB Advanced Mathematics Subsidiary Level;

(xi) concurrent enrollment in college mathematics courses; and

(xii) Mathematical Models with Applications.

(B) If selected, Mathematical Models with Applications must be taken prior to Algebra II.

(C) The SBOE may designate additional courses that meet the requirements of this paragraph.

(3) Science--four credits.

(A) One credit must be a biology credit (Biology, Advanced Placement (AP) Biology, or International Baccalaureate (IB) Biology). Students must choose two credits from the following areas. Not more than one credit may be chosen from each of the areas to satisfy this requirement.

(i) Integrated Physics and Chemistry (IPC);

(ii) Chemistry, AP Chemistry, or IB Chemistry; and

(iii) Physics, Principles of Technology I, AP Physics, or IB Physics.

(B) IPC cannot be taken as the final or fourth year of science, but must be taken before the senior year of high school. The fourth year of science may be selected from the laboratory-based courses listed in Chapter 112 of this title (relating to Texas Essential Knowledge and Skills for Science), with the addition of Engineering and Earth and Space Science.

(C) A student entering Grade 9 beginning with the 2012-2013 school year must take three science credits, at least one from each category, from the following areas:

(i) Biology, AP Biology, or IB Biology;

(ii) Chemistry, AP Chemistry, or IB Chemistry; and

(iii) Physics, Principles of Technology I, AP Physics, or IB Physics.

(D) The fourth year of science may be selected from the laboratory-based courses listed in Chapter 112 of this title (relating to Texas Essential Knowledge and Skills for Science), with the addition of Engineering and Earth and Space Science.

(E) The SBOE may designate additional courses that meet the requirements of this paragraph.

(4) Social studies--three and one-half credits. The credits must consist of World History Studies (one credit), World Geography Studies (one credit), United States History Studies Since Reconstruction (one credit), and United States Government (one-half credit).

(5) Economics, with emphasis on the free enterprise system and its benefits--one-half credit. The credit must consist of Economics with Emphasis on the Free Enterprise System and Its Benefits.

(6) Languages other than English--two credits. The credits earned must be for any two levels in the same language.

(7) Physical education--one and one-half credits to include Foundations of Personal Fitness (one-half credit).

(A) A student may not earn more than two credits in physical education toward state graduation requirements.

(B) The school district board of trustees may allow a student to substitute certain physical activities for the required credits in physical education, including the Foundations of Personal Fitness. The substitutions must be based on the physical activity involved in drill team, marching band, and cheerleading during the fall semester; Junior Reserve Officer Training Corps (JROTC); athletics; Dance I-IV; and two- or three-credit career and technology work-based training courses.

(C) In accordance with local district policy, a school district may award up to two credits for physical education for appropriate private or commercially-sponsored physical activity programs conducted on or off campus. The district must apply to the commissioner of education for approval of such programs, which may be substituted for state graduation credit in physical education. Such approval may be granted under the following conditions.

(i) Olympic-level participation and/or competition includes a minimum of 15 hours per week of highly intensive, professional, supervised training. The training facility, instructors, and the activities involved in the program must be certified by the superintendent to be of exceptional quality. Students qualifying and participating at this level may be dismissed from school one hour per day. Students dismissed may not miss any class other than physical education.

(ii) Private or commercially-sponsored physical activities include those certified by the superintendent to be of high quality and well supervised by appropriately trained instructors. Student participation of at least five hours per week must be required. Students certified to participate at this level may not be dismissed from any part of the regular school day.

(8) Health education--one-half credit, which may satisfied by Health 1 or Advanced Health, or Health Science Technology--one credit, which may be satisfied by Introduction to Health Science Technology, Health Science Technology I, or Health Science Technology II.

(9) Speech--one-half credit. The credit must consist of Communication Applications.

(10) Technology applications--one credit, which may be satisfied by:

(A) the following courses in Chapter 126 of this title (relating to Texas Essential Knowledge and Skills for Technology Applications): Computer Science I, Computer Science II, Desktop Publishing, Digital Graphics/Animation, Multimedia, Video Technology, Web Mastering, or Independent Study in Technology Applications, or state-approved technology applications innovative courses;

(B) the following courses in Chapter 120 of this title (relating to the Texas Essential Knowledge and Skills for Business Education): Business Computer Information Systems I or II, Business Computer Programming, Telecommunications and Networking, or Business Image Management and Multimedia;

(C) the following courses in Chapter 123 of this title (relating to the Texas Essential Knowledge and Skills for Technology Education/Industrial Technology Education): Computer Applications, Technology Systems (modular computer laboratory-based), Communications Graphics (modular computer laboratory-based), or Computer Multimedia and Animation Technology; or

(D) the completion of three credits (for students participating in a coherent sequence of career and technology courses or who are enrolled in a Tech Prep high school plan of study) consisting of two or more state-approved career and technology courses in Chapters 119 - 125 and 127 of this title. Districts shall ensure that career and technology courses, including innovative courses, in a coherent sequence used to meet the technology applications credit are appropriate to collectively teach the knowledge and skills found in any of the approved courses listed in subparagraphs (A), (B), and (C) of this paragraph. Students pursuing the technology applications option described in this subparagraph must demonstrate proficiency in technology applications prior to the beginning of Grade 11.

(11) Fine arts--one credit, which may be satisfied by any course in Chapter 117, Subchapter C, of this title (relating to Texas Essential Knowledge and Skills for Fine Arts).

(c) Elective Courses--three and one-half credits. The credits may be selected from the list of courses specified in §74.61(g) of this title (relating to High School Graduation Requirements). All students who wish to complete the Recommended High School Program are encouraged to study each of the four foundation curriculum areas (English language arts, mathematics, science, and social studies) every year in high school.

(d) Substitutions. No substitutions are allowed in the Recommended High School Program, except as specified in this chapter.

§74.64. Distinguished Achievement High School Program--Advanced High School Program.

(a) Credits. A student must earn at least 26 credits to complete the Distinguished Achievement High School Program.

(b) Core Courses. A student must demonstrate proficiency in the following:

(1) English language arts--four credits. The credits must consist of English I, II, III, and IV (English I for Speakers of Other Languages and English II for Speakers of Other Languages may be substituted for English I and II only for immigrant students with limited English proficiency).

(2) Mathematics--four credits. The credits must consist of Algebra I, Algebra II, and Geometry and an additional SBOE-approved mathematics course for which Algebra II is a prerequisite.

(3) Science--four credits. The credits must consist of a biology credit (Biology, Advanced Placement (AP) Biology, or International Baccalaureate (IB) Biology), a chemistry credit (Chemistry, AP Chemistry, or IB Chemistry), a physics credit (Physics, AP Physics, or IB Physics), and an additional approved laboratory-based science course. After successful completion of a biology course, a chemistry course, and a physics course, a student may select the fourth required credit from any of the following laboratory-based courses:

(A) Earth and Space Science;

(B) Environmental Systems;

(C) Aquatic Science;

(D) Astronomy;

(E) Anatomy and Physiology of Human Systems;

(F) AP Biology;

(G) IB Biology

(H) AP Chemistry;

(I) IB Chemistry;

(J) AP Physics;

(K) IB Physics;

(L) AP Environmental Science;

(M) IB Environmental Systems;

(N) Scientific Research and Design; and

(O) Engineering.

(4) Social studies--three and one-half credits. The credits must consist of World History Studies (one credit), World Geography Studies (one credit), United States History Studies Since Reconstruction (one credit), and United States Government (one-half credit).

(5) Economics, with emphasis on the free enterprise system and its benefits--one-half credit. The credit must consist of Economics with Emphasis on the Free Enterprise System and Its Benefits.

(6) Languages other than English--three credits. The credits earned must be for any three levels in the same language.

(7) Physical education--one and one-half credits to include Foundations of Personal Fitness (one-half credit).

(A) A student may not earn more than two credits in physical education toward state graduation requirements.

(B) The school district board of trustees may allow a student to substitute certain physical activities for the required credits in physical education, including the Foundations of Personal Fitness. The substitutions must be based on the physical activity involved in drill team, marching band, and cheerleading during the fall semester; Junior Reserve Officer Training Corps (JROTC); athletics; Dance I-IV; and two- or three-credit career and technology work-based training courses.

(C) In accordance with local district policy, a school district may award up to two credits for physical education for appropriate private or commercially-sponsored physical activity programs conducted on or off campus. The district must apply to the commissioner of education for approval of such programs, which may be substituted for state graduation credit in physical education. Such approval may be granted under the following conditions.

(i) Olympic-level participation and/or competition includes a minimum of 15 hours per week of highly intensive, professional, supervised training. The training facility, instructors, and the activities involved in the program must be certified by the superintendent to be of exceptional quality. Students qualifying and participating at this level may be dismissed from school one hour per day. Students dismissed may not miss any class other than physical education.

(ii) Private or commercially-sponsored physical activities include those certified by the superintendent to be of high quality and well supervised by appropriately trained instructors. Student participation of at least five hours per week must be required. Students certified to participate at this level may not be dismissed from any part of the regular school day.

(8) Health education--one-half credit, which may be satisfied by Health 1 or Advanced Health, or Health Science Technology--one credit, which may be satisfied by Introduction to Health Science Technology, Health Science Technology I, or Health Science Technology II.

(9) Speech--one-half credit. The credit must consist of Communication Applications.

(10) Technology applications--one credit, which may be satisfied by:

(A) the following courses in Chapter 126 of this title (relating to Texas Essential Knowledge and Skills for Technology Applications): Computer Science I, Computer Science II, Desktop Publishing, Digital Graphics/Animation, Multimedia, Video Technology, Web Mastering, or Independent Study in Technology Applications, or state-approved technology applications innovative courses;

(B) the following courses in Chapter 120 of this title (relating to the Texas Essential Knowledge and Skills for Business Education): Business Computer Information Systems I or II, Business Computer Programming, Telecommunications and Networking, or Business Image Management and Multimedia;

(C) the following courses in Chapter 123 of this title (relating to the Texas Essential Knowledge and Skills for Technology Education/Industrial Technology Education): Computer Applications, Technology Systems (modular computer laboratory-based), Communications Graphics (modular computer laboratory-based), or Computer Multimedia and Animation Technology; or

(D) the completion of three credits (for students participating in a coherent sequence of career and technology courses or who are enrolled in a Tech Prep high school plan of study) consisting of two or more state-approved career and technology courses in Chapters 119 - 125 and 127 of this title. Districts shall ensure that career and technology courses, including innovative courses, in a coherent sequence used to meet the technology applications credit are appropriate to collectively teach the knowledge and skills found in any of the approved courses listed in subparagraphs (A), (B), and (C) of this paragraph. Students pursuing the technology applications option described in this subparagraph must demonstrate proficiency in technology applications prior to the beginning of Grade 11.

(11) Fine arts--one credit, which may be satisfied by any course in Chapter 117, Subchapter C, of this title (relating to Texas Essential Knowledge and Skills for Fine Arts).

(c) Elective Courses--two and one-half credits. The credits may be selected from the list of courses specified in §74.61(g) of this title (relating to High School Graduation Requirements). All students who wish to complete the Distinguished Achievement High School Program are encouraged to study each of the four foundation curriculum areas (English language arts, mathematics, science, and social studies) every year in high school.

(d) Advanced measures. A student also must achieve any combination of four of the following advanced measures. Original research/projects may not be used for more than two of the four advanced measures. The measures must focus on demonstrated student performance at the college or professional level. Student performance on advanced measures must be assessed through an external review process. The student may choose from the following options:

(1) original research/project that is:

(A) judged by a panel of professionals in the field that is the focus of the project; or

(B) conducted under the direction of mentor(s) and reported to an appropriate audience; and

(C) related to the required curriculum set forth in §74.1 of this title (relating to Essential Knowledge and Skills);

(2) test data where a student receives:

(A) a score of three or above on the College Board advanced placement examination;

(B) a score of four or above on an International Baccalaureate examination; or

(C) a score on the Preliminary Scholastic Assessment Test (PSAT) that qualifies the student for recognition as a commended scholar or higher by the National Merit Scholarship Corporation, as part of the National Hispanic Scholar Program of the College Board or as part of the National Achievement Scholarship Program for Outstanding Negro Students of the National Merit Scholarship Corporation. The PSAT score shall count as only one advanced measure regardless of the number of honors received by the student; or

(3) college academic courses, advanced technical credit courses, and dual credit courses, including local articulation, with a grade of 3.0 or higher.

(e) Substitutions. No substitutions are allowed in the Distinguished Achievement High School Program, except as specified in this chapter.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 20, 2006.

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For further information, please call: (512) 475-1497

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CHAPTER 102. EDUCATIONAL PROGRAMS
SUBCHAPTER FF. COMMISSIONER'S RULES CONCERNING GOVERNOR'S EDUCATOR EXCELLENCE AWARD PROGRAMS

19 TAC §102.1071

The Texas Education Agency (TEA) adopts new §102.1071, concerning the Governor's Educator Excellence Award Program--Texas Educator Excellence Grant. The new section is adopted with changes to the proposed text as published in the August 18, 2006, issue of the *Texas Register* (31 TexReg 6453). The new section implements the requirements of the Texas Education Code (TEC), Chapter 21, Subchapter N, as added by House Bill 1, 79th Texas Legislature, Third Called Session, 2006, that requires the commissioner to, by rule, establish procedures and adopt guidelines for the administration of the awards for the student achievement program.

House Bill 1, 79th Texas Legislature, Third Called Session, added the TEC, Chapter 21, Subchapter N, establishing a program whereby classroom teachers and other campus personnel may receive an incentive award from an eligible campus through the student achievement program. The legislation requires that the commissioner establish the grant award program and adopt rules for developing a campus incentive plan and the awarding of funds.

Statute requires that at least 75% of the total award must be used to provide incentives to classroom teachers who have both demonstrated success in improving student performance using objective, quantifiable measures and who have collaborated with faculty and staff and contributed to improving overall student performance on the campus. The remaining 25% of the award must be used to fund other activities which may include incentives for other school personnel, professional development for classroom teachers who did not receive an incentive payment, teacher mentoring support, recruitment and retention of highly-qualified teachers, teacher stipends, and other programs that have been proven to contribute directly in improving student achievement. Grant funds may not be used for an employee whose primary responsibility is supervision of an athletic activity.

The adopted new 19 TAC §102.1071 implements this new legislation by establishing the Governor's Educator Excellence Award Program--Texas Educator Excellence Grant. The new rule adopts provisions that: (1) prescribe a procedure that a school district and open-enrollment charter school must follow to apply for and receive funding on behalf of an eligible campus for the grant program under this section; (2) establish guidelines for determining which campuses are eligible to receive funding; (3) provide guidelines by which a campus will submit to the agency an incentive plan developed by a campus-level decision-making body and with significant classroom teacher involvement; and (4) stipulate the manner in which incentive payments are allocated to classroom teachers and other eligible campus employees. The following changes were made to new 19 TAC §102.1071 since published as proposed.

In subsection (b), relating to campus eligibility, a technical change was made to move language in paragraph (2) regarding multiple years of eligibility to new paragraph (3) for organizational purposes. In response to public comment, language from proposed paragraph (3) regarding ineligibility due to receipt of the Governor's Educator Excellence Grant was deleted. This change allows for additional program flexibility.

In subsection (c), relating to campus incentive plan, a new paragraph (5) was added in response to public comment to establish that a district must follow local school board policy for submitting a campus plan and grant application to the TEA, including optional designation of that authority to the superintendent. Proposed paragraph (5) was renumbered accordingly. Also in response to public comment, a new paragraph (7) was added to specify that a local decision on an incentive plan and/or grant application is not appealable to the commissioner of education.

In subsection (d), relating to amount of program award, a technical edit was made to paragraph (1) to clarify that campus incentive plans are to be approved by the TEA to establish entitlement to a grant award.

In subsection (e), relating to incentive payments to classroom teachers, new paragraph (3)(A) was added in response to public comment to clarify the definition of a classroom teacher, including specifications about necessary functions related to instructional assignments. New paragraph (3)(B) was also added in response to public comment to clarify certification and employment qualifications.

Also in subsection (e), a new paragraph (5) was added in response to public comment to set forth that campuses or districts may choose to exclude certain specified teachers from receiving incentive awards. The campus incentive plan must reflect the campus/district policies with regard to these teachers at the program start date. A new paragraph (6) was also added in response to public comment to address individual incentives that are less than the minimum or exceed the maximum amounts established in statute. This new paragraph would also establish that a local school board decision on individual incentive award amounts is not appealable to the commissioner.

In subsection (f), relating to distribution of other program funds, proposed language was reorganized in response to public comment to provide clarification about the use of funds for distributing incentive payments as set forth in the TEC, §21.657.

Following is a summary of public comments received relating to the proposed new 19 TAC §102.1071 and corresponding agency responses.

Comment. The Texas Association of School Boards (TASB) and a professor from Vanderbilt University requested that language be deleted that prohibits campuses that received the Governor's Educator Excellence Grant in 2005 from receiving the award described in this section until June 1, 2009.

Agency response. The agency agrees and modified subsection (b) by deleting paragraph (3) regarding ineligibility due to receipt of the Governor's Educator Excellence Grant. This change allows for additional program flexibility.

Comment. The TASB requested that language be added to require that school districts act pursuant to their local board policy for submitting campus incentive plans.

Agency response. The agency agrees and modified subsection (c) by adding a new paragraph (5) to establish that a district must follow local school board policy for submitting a campus plan and grant application to the TEA, including optional designation of that authority to the superintendent. In addition, a new paragraph (7) was added to specify that a local decision on an incentive plan and/or grant application is not appealable to the commissioner of education.

Comment. A member of a campus planning team from Houston Independent School District asked for clarification about the definition of classroom teacher, specifically whether teachers must be certified.

Agency response. The agency agrees and modified subsection (e)(3) by adding new subparagraph (A) to clarify the definition of a classroom teacher, including specifications about necessary functions related to instructional assignments. New subparagraph (B) was also added to clarify certification and employment qualifications. This language is taken from existing statute (TEC) so it does not change the meaning, but rather, provides additional clarity to readers.

Comment. The TASB requested that language be added regarding exclusion of certain teachers; for example, those who have transferred, retired, work part-time, etc.

Agency response. The agency agrees and modified subsection (e) by adding a new paragraph (5) regarding exclusion of certain teachers. The campus incentive plan must reflect the campus/district policies with regard to these teachers at the program start date.

Comment. The TASB asked for clarification regarding the amount of incentive payments to classroom teachers and for specification that an incentive award decision is final and may not be appealed to the commissioner of education.

Agency response. The agency agrees and modified subsection (e) by adding a new paragraph (6) to address individual incentives that are less than the minimum amount or exceed the maximum amount established in statute. This new paragraph would also establish that a local school board decision on individual incentive award amounts is not appealable to the commissioner.

Comment. A member of the campus planning team from Hillsboro Independent School District requested clarification regarding the percentage distribution of other program funds.

Agency response. Language in statute is clear. The TEC, §21.657, states: "An eligible campus must use 25 percent of a grant award received under Section 21.655..." However, for clarification, the agency reorganized subsection (f) to provide further guidance on the use of funds for distributing incentive payments as set forth in TEC, §21.657.

The new section is adopted under the Texas Education Code (TEC), §21.652 and §21.658, which authorize the commissioner to, by rule, establish procedures and adopt guidelines for the administration of the awards for the student achievement program.

The new section implements the Texas Education Code, §§21.652 - 21.658.

§102.1071. Governor's Educator Excellence Award Program--Texas Educator Excellence Grant.

(a) Establishment of program.

(1) In accordance with the Texas Education Code (TEC), §21.652, the Governor's Educator Excellence Award Program--Texas Educator Excellence Grant is established as an annual grant program under which a district or open-enrollment charter school may receive a grant on behalf of an eligible campus as an award for student achievement. Provisions regarding implementation of the program are described in this section.

(2) Funds from this program will be distributed to a district or open-enrollment charter school, on behalf of an eligible campus, that submitted an approved campus incentive plan developed in accordance with the TEC, §21.654, and subsection (c) of this section.

(b) Campus eligibility.

(1) Campus eligibility shall be determined in accordance with the TEC, §21.653.

(2) Each year of the grant, a new list of eligible campuses will be published by the Texas Education Agency (TEA). Academically Unacceptable campuses will not be included on this list.

(3) Campuses may be eligible to receive this grant multiple times.

(c) Campus incentive plan.

(1) As delineated in the TEC, §21.654, a campus incentive plan must be:

(A) developed by each campus-level decision-making body;

(B) approved by its district-level committee; and

(C) submitted by a district on behalf of an eligible campus.

(2) The campus-level body developing the plan should be composed of individuals representing a diverse and broad mix of teachers, including representation from different grade levels and subject areas.

(3) The district may choose to provide guidance to campuses in the creation of plans.

(4) The TEA may consider for approval only a campus incentive plan developed, approved, and submitted in accordance with the TEC, §21.654, and this section.

(5) A district must act pursuant to its local school board policy for submitting a campus incentive plan and grant application to the TEA. A local school board may either vote to submit a grant application or designate the superintendent to submit the application on the board's behalf. A superintendent may act on previously delegated authority regarding the submission of the grant(s).

(6) A campus that has implemented an approved incentive plan may choose to renew its plan, should it be eligible for funding in subsequent years, for up to three years after the first year of implementation.

(7) A decision by a local school board to approve and/or submit its incentive plan and/or grant application is not appealable to the commissioner of education. A local grievance decision as to whether an award was made in compliance with the approved plan is not appealable to the commissioner of education.

(d) Amount of program award.

(1) In accordance with the TEC, §21.655, each eligible campus whose campus incentive plan is approved by the TEA is enti-

tled to a grant award in an amount determined by the commissioner of education.

(2) Award amounts may vary from one year to the next.

(e) Incentive payments to classroom teachers.

(1) An eligible campus must distribute a specified percentage of its program grant award to classroom teachers in accordance with the TEC, §21.656.

(2) All funds must be used to provide incentives not previously funded with state, local, or federal funds.

(3) Incentives awarded under this subsection may be used only for classroom teachers. For the purposes of this subsection, the term "classroom teacher" is defined as "an educator who is employed by a school district and who, not less than an average of four hours each day, teaches in an academic instructional setting or a career and technology instructional setting." For the purposes of this subsection, the definition of the term "classroom teacher" does not include a teacher's aide or a full-time administrator.

(A) Necessary functions related to the classroom teacher's instructional assignment, such as instructional planning and transition between instructional periods, should be applied to creditable classroom time. Time spent on duties unrelated to instruction should not be credited toward classroom time.

(B) For a school district, a classroom teacher, as defined in this subsection, must hold an appropriate certificate issued by the State Board for Educator Certification and must meet the specifications regarding instructional duties defined in this subsection. For a charter school, a classroom teacher is not required to be certified, but must meet the qualifications of the employing charter school and the specifications regarding instructional duties defined in this subsection.

(4) As specified in the TEC, §21.656, and further delineated in this subsection, an eligible campus receiving program funds may distribute an incentive payment only to a classroom teacher who:

(A) demonstrates success in improving student achievement. Measures determining a classroom teacher's success in improving student performance must allow for program administrators to evaluate teacher impact on student achievement; and

(B) successfully collaborates with faculty and staff to contribute to improving overall student performance on the campus. The collaboration must be measured using campus-based activities. Participation in tutoring sessions or personal-planning periods is not a sufficient measure of collaboration.

(5) A campus or district may choose to exclude from receiving an incentive award a teacher who has transferred or retired or who works part-time on a campus eligible to receive grant funds. In such an instance, the campus incentive plan must reflect the campus/district policies with regard to such a teacher at the program start date.

(6) Each individual incentive should be no less than $3,000 and no more than $10,000 per teacher to the extent practicable. If teacher awards are less than $3,000 or more than $10,000, the campus plan must include the reasons that a total possible individual award amount between $3,000 and $10,000 per teacher was not practicable. A local school board decision as to whether award amounts between $3,000 and $10,000 per teacher are practicable is final and may not be appealed to the commissioner of education.

(f) Distribution of other program funds. An eligible campus receiving program funds must use a specified percentage of its program grant award for some or all of the provisions specified in the TEC, §21.657(a), when distributing incentive payments, including the requirements specified in paragraphs (1) - (3) of this subsection when applicable. Program funds distributed under the TEC, §21.657, may also be used to increase the total amount of funds to provide awards to classroom teachers under the TEC, §21.656.

(1) Stipends paid for teachers to participate in after-school or Saturday programs, as specified in the TEC, §21.657(a)(10), must be used to supplement not supplant.

(2) Stipends paid for teachers who hold a postgraduate degree, as specified in the TEC, §21.657(a)(12), must be for a postgraduate degree that will improve instructional abilities, excluding education administration, mid-management certification, and superintendency certification. These stipends must be used to supplement not supplant.

(3) Extending funding to feeder campuses, as outlined in the TEC, §21.657(a)(13), must be used to implement an activity described in the TEC, §21.657. The student population of the feeder campus shall not be used to determine campus award eligibility or the award amount.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 20, 2006.

TRD-200606864
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Effective date: January 9, 2007
Proposal publication date: August 18, 2006
For further information, please call: (512) 475-1497

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TITLE 22. EXAMINING BOARDS

PART 11. BOARD OF NURSE EXAMINERS

CHAPTER 214. VOCATIONAL NURSING EDUCATION

22 TAC §214.7

The Board of Nurse Examiners adopts the amendments to 22 Texas Administrative Code §214.7, pertaining to Vocational Nursing Education, without changes to the proposed text as published in the November 10, 2006, issue of the *Texas Register* (31 TexReg 9198).

Section 214.7 specifically addresses Faculty Qualifications and Faculty Organization. The amendments are pertinent to faculty waivers.

Concurrent with this adoption, the Board is adopting an amendment to §215.7 which addresses faculty waivers in Professional Nursing Education.

In September 2006, the Staff of the Texas Sunset Advisory Commission recommended in its report that the Board adopt "its current requirements for waivers of faculty requirements into Board rule...and the Board would no longer need to issue waivers." In

compliance with this recommendation, the Board adopts amendments to the professional and vocational nursing education rules incorporating the waiver guidelines into rule. Though the education programs would no longer be required to submit a waiver petition, the amendment requires that programs notify the Board with a notarized statement that they meet both the minimum criteria for the program and for the prospective faculty member as delineated in the rule. Board approval, however, will continue to be required if the program's NCLEX pass rate is too low, or too many faculty member have not met the qualifications required by the Board.

No comments were received regarding the proposed amendments.

The amendments are adopted pursuant to the authority of Texas Occupations Code, §301.157 and §301.151 which authorizes the Board of Nurse Examiners to adopt, enforce, and repeal rules consistent with its legislative authority under the Nursing Practice Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 20, 2006.

TRD-200606851
Katherine Thomas
Executive Director
Board of Nurse Examiners
Effective date: January 9, 2007
Proposal publication date: November 10, 2006
For further information, please call: (512) 305-6823

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CHAPTER 215. PROFESSIONAL NURSING EDUCATION

22 TAC §215.7

The Board of Nurse Examiners adopts the amendments to 22 Texas Administrative Code §215.7, pertaining to Professional Nursing Education, without changes to the proposed text as published in the November 10, 2006, issue of the *Texas Register* (31 TexReg 9199).

Section 215.7 specifically addresses Faculty Qualifications and Faculty Organization. The amendment is pertinent to faculty waivers.

Concurrent with this adoption, the Board is adopting an amendment to §214.7 which addresses faculty waivers in Vocational Nursing Education.

In September 2006, the Staff of the Texas Sunset Advisory Commission recommended in its report that the Board adopt "its current requirements for waivers of faculty requirements into Board rule...and the Board would no longer need to issue waivers." In compliance with this recommendation, the Board adopts amendments to the professional and vocational nursing education rules incorporating the waiver guidelines into rule. Though the education programs will no longer be required to submit a waiver petition, the amendment requires that programs notify the Board with a notarized statement that they meet both the minimum criteria for the program and for the prospective faculty member as delineated in the rule. Board approval, however, will continue to be required if the program's NCLEX pass rate is too low, or too many faculty member have not met the qualifications required by the Board.

One comment was received from the Texas Nurses Association in support of the proposed amendment.

The amendments are adopted pursuant to the authority of Texas Occupations Code, §301.157 and §301.151 which authorizes the Board of Nurse Examiners to adopt, enforce, and repeal rules consistent with its legislative authority under the Nursing Practice Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200606849
Katherine Thomas
Executive Director
Board of Nurse Examiners
Effective date: January 9, 2007
Proposal publication date: November 10, 2006
For further information, please call: (512) 305-6823

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PART 25. TEXAS STRUCTURAL PEST CONTROL BOARD

CHAPTER 599. TREATMENT STANDARDS

22 TAC §599.3

The Texas Structural Pest Control Board adopts an amendment to 22 TAC §599.3, concerning Subterranean Termite Pre-Construction Treatments, without changes to the proposed text as published in the September 1, 2006, issue of the *Texas Register* (31 TexReg 7089).

Justification for the adopted amendment is to incorporate the proposal that will allow the use and disclosure of wood framing pre-construction treatments.

The amendment will function by recognizing the emerging technology of borates in wood framing pre-construction treatments. The revised rule will also help the rule be consistent with U.S. Environmental Protection Agency labels concerning the treatment of wood framing with borates.

Only one comment was received. That comment was from the National Pest Management Association (NPMA). NPMA has proposed language to 22 TAC §599.3(b) to include wood framing pre-construction treatments with liquid applications. The Board disagrees with that comment, because borates would be covered as a liquid treatment under 22 TAC §599.3(b).

The next comment by NPMA concerns 22 TAC §599.3(e). NPMA proposes replacing the wording concerning "barrier treatment protection" with the language "wood framing pre-construction treatment" in the first line of the subsection. The Board disagrees with that comment since the proposed language already addresses a wood barrier treatment.

NPMA continues its comments on 22 TAC §599.3(e). The proposed language by NPMA is "with the wood treatment termiticide." The Board disagrees with the comment because the proposed language already addresses an application to the wood framing.

Other comments were made by NPMA on 22 TAC §599.3(e) stating "wood treatment termiticides" and "of the product." The Board disagrees with this comment, pointing out that the proposed language does not add anything to the rule since the rule already specifically says what situations are to be used and what products may be applied under label restrictions.

The final comment by NPMA is regarding 22 TAC §599.3(f). NPMA proposes identification of "wood framing pre-construction treatment" in additional to full or partial treatment. The Board disagrees with the comment by pointing out that if an application to a wood framing is made, then under Board rules, the application will be identified as a borate application as well as a full treatment.

The amendment is adopted under the Structural Pest Control Act, Chapter 1951 of the Occupations Code, which provides the Texas Structural Pest Control Board with the authority to license and regulate the structural pest control industry.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 19, 2006.

TRD-200606825
Murray Walton
Executive Director
Texas Structural Pest Control Board
Effective date: January 8, 2007
Proposal publication date: September 1, 2006
For further information, please call: (512) 305-8270

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22 TAC §599.4

The Texas Structural Pest Control Board adopts an amendment to 22 TAC §599.4, concerning Termite Treatment Disclosure Documents, without changes to the proposed text as published in the September 1, 2006, issue of the *Texas Register* (31 TexReg 7089).

Justification for the adopted amendment is to reflect the pre-construction treatment standards on wood framing on the Board's Proper Pre-Construction Subterranean Termite Treatments form.

The amendment will function by recognizing the emerging technology of borates in wood framing pre-construction treatments. The revised rule will also help the rule be consistent with U.S. Environmental Protection Agency labels concerning the treatment of wood framing with borates. The Board's forms need to be updated to include these changes, which is the primary purpose of this revision.

No comments were received regarding the amendment.

The amendment is adopted under the Structural Pest Control Act, Chapter 1951 of the Occupations Code, which provides the Texas Structural Pest Control Board with the authority to license and regulate the structural pest control industry.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 19, 2006.

TRD-200606826
Murray Walton
Executive Director
Texas Structural Pest Control Board
Effective date: January 8, 2007
Proposal publication date: September 1, 2006
For further information, please call: (512) 305-8270

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TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 73. LABORATORIES

25 TAC §73.21, §73.54

The Executive Commissioner of the Health and Human Services Commission (commission), on behalf of the Department of State Health Services (department), adopts amendments to §73.21 concerning newborn screening, and §73.54 concerning fees for clinical testing and newborn screening. The amendments to §73.21 and §73.54 are adopted with changes to the proposed text as published in the July 21, 2006, issue of the *Texas Register* (31 TexReg 5749).

BACKGROUND AND PURPOSE

The amendments are authorized by Health and Safety Code, §§12.031, 12.032, and 12.0122, which allow the department to charge fees to a person who receives public health services from the department, and which are necessary for the department to recover costs for performing laboratory services. The amendments are also authorized by Health and Safety Code, Chapter 33, which was amended in 2005 to expand the scope of newborn screening in Texas.

SECTION-BY-SECTION SUMMARY

The proposed amendments to §73.21 included new definitions for "screen", "specimen collection form", "specimen collection kits", and "replacement specimen collection kits". The definition for "test kit" was deleted, the references to "test kit(s)" were replaced with "specimen collection kit(s)", and the references to "screening panel(s)" were replaced with "screen(s)". Section 73.54 included a new fee for a two-screen specimen collection kit that was equal to the fee for two single screen specimen collection kits.

The proposed amendments presented for public comment included a definition for "specimen collection kits" that gave the department an option to offer a "single screen" or a "two-screen specimen collection kit." Based upon public comment, the option for a "two-screen specimen collection kit" has been eliminated. The option for a "two-screen specimen collection kit" has been removed from the definition of "specimen collection

kit" in §73.21. Pursuant to that change in the definition, editorial changes have been made to remove all references to a "two-screen collection kit" from §73.21 and from the fee schedule for Newborn Screening in §73.54.

COMMENTS

The department, on behalf of the commission, has reviewed and prepared a response to the comments received, which the commission has reviewed and accepts. The commenters were physicians, nurses, medical technologists, laboratory directors, a medical office administrator and the Coalition of Nurses in Advanced Practice. The commenters were not against the rules in their entirety; however, the commenters expressed concerns about the success of the proposed process for linking the first and second screen for each newborn using the "two-screen specimen collection kit" and asked specific questions about the process.

Comments: Commenters were concerned that mothers would damage, lose or forget the specimen collection form for the second screen and as a result, may not bring the baby in for the two-week visit; that expecting the mother to remember this is unrealistic; and that the cost of newborn screening would increase because of the large number of replacement forms that would purportedly be needed. The commenters preferred to have the forms for the second screen available in the physician's office rather than depending on the mother to bring it with her (if a two-screen model is employed). Commenters were concerned that mothers with a limited knowledge of English will not understand about bringing in the second form. Commenters wanted to know: who would pay for the "two-screen specimen collection kits"; how the hospitals and clinics would share the billing for the collection kits and for the collection of the second screen; how the second screen would be linked to the first if the mother damages, loses or forgets the original second screen collection form; if replacements forms would be available to the physician; if the physician may continue to send patients back to the hospital for the second screen; and who is responsible for ensuring that the second screen is performed-the hospital, the physician, or the parents?

Response: The commission agrees that there are concerns regarding the two-screen model, and has changed the definition of "specimen collection kits" by removing the option for a "two-screen specimen collection kit", and all other references to the "two-screen specimen collection kits" in both rules. Also, the proposed new fee has been removed from §73.54. The department's decision not to use a "two-screen specimen collection kit", or the proposed process for linking the first and second screens for every newborn, addresses the concerns expressed by the commenters summarized above. Changes have been made to these rules as a result of these comments.

Comment: One commenter requested a minor change to the definition of a "two-screen specimen collection kit". The definition refers to "first doctors visit". The commenter stated that language is inconsistent with the language throughout the proposed rule and suggested the phrase be changed to "the newborn's first health care visit".

Response: The commission disagrees because the department has decided not to use a "two-screen specimen collection kit", or the proposed process for linking the first and second screens for every newborn, for the reasons stated herein. It is, therefore, unnecessary to revise the two-screen option language in the rule. No changes were made to these rules as a result of this comment.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Cathy Campbell, certifies that the rules, as adopted, have been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

STATUTORY AUTHORITY

The amended sections are adopted under Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of the Health and Safety Code, Chapter 1001; Health and Safety Code, Chapter 33, which requires the department to implement the newborn screening program, in accordance with rules adopted by the Executive Commissioner; §12.001, which provides the Executive Commissioner the authority to adopt rules for the performance of every duty imposed by law on the Executive Commissioner, department and commissioner; §12.031 and §12.032, which allows the Executive Commissioner to charge fees to a person who receives public health services from the department; §12.034, which requires the Executive Commissioner to establish collection procedures; §12.035, which requires the department to deposit all money collected for fees and charges under §12.032 and §12.033 in the state treasury to the credit of the Department of State Health Services public health service fee fund; and §12.0122 which allows the department to enter into a contract for laboratory services.

§73.21. Newborn Screening.

(a) Purpose. This section establishes procedures for the purchase and submission of newborn screening specimen collection kits provided by the Department of State Health Services (department).

(b) Definitions. The following words and terms, when used in this section, shall have the following meanings unless the context clearly indicates otherwise.

(1) Charity care newborn--A patient who is not insured and is not covered or eligible to be covered for newborn screening services by Medicaid or any other government program.

(2) Medicaid-eligible newborn--A patient whose mother is a Medicaid recipient or who is otherwise eligible for Medicaid coverage for the newborn-related services.

(3) Newborn Screening (NBS)--Newborn screening is a requirement of the Health and Safety Code, Chapter 33. Each screen consists of one or more tests to identify a newborn who may be at risk of having phenylketonuria, other heritable diseases, or hypothyroidism. Additional screens may be necessary under certain circumstances.

(4) Provider--The hospital, birthing center, physician, midwife, or clinic that collects and submits the NBS specimen.

(5) Screen--One or more tests that identify an increased risk for a disorder, which must be confirmed by diagnostic tests. A screen may produce false positive or false negative results and should not be relied upon as "diagnostic."

(6) Specimen collection form--The specimen collection form consists of a patient demographic information sheet (original and carbonless copy) with an attached filter paper collection device.

(7) Specimen collection kit--A single department-approved bar-coded, quality controlled filter paper collection device, demographic information sheet and envelope which may be used to submit a newborn's blood specimen for the first or second screen, repeat or follow-up testing. This term includes replacement specimen collection forms.

(8) Replacement specimen collection forms--consist of a specimen collection kit for instances when a previously purchased specimen collection form is lost, damaged or otherwise unavailable.

(c) Specimen collection kits.

(1) The department will provide newborn screening specimen collection kits upon written request from a provider of newborn screening. A separate specimen collection form is required for each screen.

(A) The department will provide specimen collection kits for Medicaid-eligible or charity care newborns at no cost to the provider.

(B) The department will provide specimen collection kits for all other newborns at a fee described in §73.54(1)(H) of this title.

(2) When a provider requests specimen collection kits, the provider must identify the number estimated to be needed for Medicaid-eligible newborns, charity care newborns and other newborns. The provider's estimate shall be based on the provider's newborn screening services provided in the most recent fiscal or calendar year if the provider has previously provided these services. A provider shall provide further information upon request of the department to verify the appropriateness of the number of specimen collection kits provided at no cost. A provider may use the no cost specimen collection kit only for a Medicaid-eligible or charity care newborn.

(3) The department will bill the requesting provider for specimen collection kits when the specimen collection kits are sent to the provider. Payment is due within 120 days from the provider's receipt of the specimen collection kits.

(4) The department shall accept only its approved specimen collection kits for submission of specimens.

(5) The provider shall ensure that the identifying and demographic information provided with the specimen collection kit is complete and accurate when submitted to the department.

§73.54. Fee Schedule for Clinical Testing and Newborn Screening.

Fees for clinical testing and newborn screening shall not exceed the following amounts.

(1) Human specimens.

(A) Bacteriology.

(i) Aerobic isolation, comprehensive--$119.

(ii) Aerobic isolation, definitive I.D.--$35.

(iii) Anaerobic isolation, comprehensive--$94.

(iv) Anaerobic isolation, definitive I.D.--$35.

(v) Bioterrorism:

(I) culture--$119; and

(II) smear--$19.

(vi) *Bordetella pertussis*:

(I) culture--$138; and

(II) molecular testing--$125.

(vii) *C. botulinum* isolation--$94.

(viii) Diphtheria culture--$113.

(ix) Drug susceptibility testing:

(I) VRE (vancomycin resistant enterococcus)--$63;

(II) VRSA (vancomycin resistant *Staphylococcus aureus*--$63;

(III) MRSA (methicillin resistant *Staphylococcus aureus*)--$63;

(IV) *Neisseria gonorrhoeae*--$63; and

(V) One drug susceptibility testing--$63.

(x) Enteric pathogens--$88.

(xi) Magnetic bead enrichment for *E. coli, Enterohemorrhagic E. coli* (EHEC)--$50.

(xii) Fecal fat screen--$9.

(xiii) Fecal occult blood--$7.

(xiv) Fecal WBC smear--$10.

(xv) Genetic probe:

(I) gonorrhea/chlamydia (GC/CT)--$31;

(II) amplified probe for gonorrhea--$31;

(III) amplified probe for chlamydia--$31;

(IV) amplified probe for gonorrhea/chlamydia--$63; and

(V) amplified probe for human papillomavirus (HPV)--$52.

(xvi) Gram stain smear with fecal WBC--$12.

(xvii) Identification and typing:

(I) Immuno method, *Salmonella* and *Shigella*--$13;

(II) *Haemophilus influenzae*--$119;

(III) *Neisseria meningitides*--$119;

(IV) noncomplex typing (*Vibrio*, *Brucella*, etc.)--$63;

(V) other complex typing--$130;

(VI) *Salmonella*--$119;

(VII) *Shigella*--$73;

(VIII) *Streptococcus*, Group A (GAS)--$88;

(IX) Streptococcus, typing Groups B, C, D, G--$88; and

(X) Legionella--$88.

(xviii) KOH exam except for skin, hair and nails--$10.

(xix) KOH for skin, hair and nails--$10.

(xx) Molecular studies:

(I) pulsed-field gel electrophoresis (PFGE)--$125; and

(II) polymerase chain reaction (PCR)--$56.

(xxi) Mycolic acid studies--$31.

(xxii) *Neisseria gonorrhoeae* culture--$56.

(xxiii) Pure culture identification:

(I) aerobes--$56;

(II) anaerobes--$100;

(III) *Campylobacter*--$69; and

(IV) *Neisseria gonorrhoeae*--$69.

(xxiv) Routine cultures:

(I) any source except urine--$22;

(II) blood--$22;

(III) stool, *Campylobacter* and *E. Coli* 0157--$34;

(IV) stool, *Salmonella* and *Shigella*--$34; and

(V) urine--$20.

(xxv) *Streptococcus*screen--$25.

(xxvi) Toxin studies:

(I) *Botulinum* toxin--$163;

(II) *Clostridium difficile* toxin--$21;

(III) Shiga toxin--$94;

(IV) Toxic Shock Syndrome Toxin-1 (TSST)--$160; and

(V) *Vibrio cholera* toxin--$88.

(xxvii) *Vibrio* culture--$88.

(xxviii) Wet mount, vaginal--$10.

(B) Clinical chemistry.

(i) 5'nucleotidase--$61.

(ii) Acetone--$8.

(iii) Albumin, serum, urine or other source--$9.

(iv) Aldose--$52.

(v) Alkaline phosphatase isoenzymes--$37.

(vi) Alkaline phosphatase--$9.

(vii) ALT (Alanine aminotransferase)--$9.

(viii) AST (Aspartate aminotransferase)--$9.

(ix) Amylase, serum--$11.

(x) Ammonia--$35.

(xi) B-12--$12.

(xii) B-12 and folic acid--$59.

(xiii) Bilirubin direct--$9.

(xiv) Bilirubin, Total--$9.

(xv) Blood typing:

(I) ABO typing--$9;

(II) antibody screen (blood type)--$25;

(III) antigen typing (blood type)--$13;

(IV) antigen titering--$13;

(V) direct COOMBS--$54; and

(VI) Rh typing--$13.

(xvi) Blood Urea Nitrogen (BUN)--$7.

(xvii) Calcium--$9.

(xviii) Calcium-125--$42.

(xix) Calcium, ionized--$80.

(xx) Carbon dioxide (CO2)--$9.

(xxi) CEA (carcinombryonic antigen)--$34.

(xxii) Chloride, serum--$9.

(xxiii) Chloride, urine--$10.

(xxiv) Cholesterol:

(I) cholesterol and high density lipoprotein (HDL)--$9; and

(II) cholesterol only--$8.

(xxv) Cholinesterase, RBC--$14.

(xxvi) Creatine Kinase (CK) assay--$11.

(xxvii) Creatine Kinase (CK) isoenzymes--$29.

(xxviii) Creatine Kinase (CK) MB fraction--$13.

(xxix) Creatinine assay--$9.

(xxx) Creatinine clearance test--$16.

(xxxi) Creatinine, urine--$9.

(xxxii) Cortisol--$29.

(xxxiii) Electrolyte Panel--$14.

(xxxiv) Estradiol, serum--$49.

(xxxv) Estradiol, free--$49.

(xxxvi) Estrogens, total--$100.

(xxxvii) Ferritin--$24.

(xxxviii) Folate--$12.

(xxxix) Folic acid, serum--$26.

(xl) Fructosamine--$26.

(xli) FSH (follicle stimulating hormone)--$32.

(xlii) G-6-PD--$24.

(xliii) Gastrin--$24.

(xliv) GGT (gamma-glutamyl transferase--$12.

(xlv) Glucose:

(I) glucose, postprandial, 0 and 2 hours--$14;

(II) glucose, random, fasting--$7;

(III) glucose tolerance test, 1 hour--$14;

(IV) glucose tolerance test, 2 hour--$21; and

(V) glucose tolerance test, 3 hour--$28.

(xlvi) Heavy metal screen, urine--$46.

(xlvii) Hantoglobin--$25.

(xlviii) Hemoglobin, total--$6.

(xlix) Hemoglobin A1C--$23.

(l) Hemoglobinopathy--$15.

(li) Hematology:

(I) CBC with differential--$14;

(II) CBC complete, automated with differential--$13;

(III) CBC complete, automated without differential--$11;

(IV) Differential, manual--$7;

(V) Erythropoietin--$46;

(VI) Platelet count--$9;

(VII) Prothrombin time--$9;

(VIII) PTT (partial pthromoplastin time)--$11;

(IX) Reticulocyte count--$10; and

(X) Sedimentation rate--$6.

(lii) Iron binding capacity--$16.

(liii) Iron panel--$87.

(liv) Iron, total--$11.

(lv) Lactic acid--$74.

(lvi) LDH (lactic acid dehydrogenase) isoenzymes--$41.

(lvii) LDH total--$10.

(lviii) lead, blood--$31.

(lix) Lead screen--$11.

(lx) Lipid profile, includes cholesterol; triglycerides; HDL; and low-density lipoprotein (LDL)--$28.

(lxi) LH (leutenizing hormone)--$32.

(lxii) Lipase--$14.

(lxiii) Liver (hepatic) function panel--$14.

(lxiv) Magnesium--$12.

(lxv) Osmolatity, blood--$63.

(lxvi) Osmolaity, urine--$87.

(lxvii) Parathyriod antibody, c-terminal, mid-mole--$92.

(lxviii) Phenylalanine--$38.

(lxix) Phosphorus--$9.

(lxx) Phosphorus, urine--$9.

(lxxi) Potassium, urine--$9.

(lxxii) Pregnancy test, serum--$13.

(lxxiii) Pregnancy test, urine (HCG-qualitative)--$13.

(lxxiv) Prolactin--$34.

(lxxv) Protein, total--$7.

(lxxvi) Protein, total, 24 hour--$10.

(lxxvii) PSA (Prostatic specific antigen)--$26.

(lxxviii) Rheumatoid factor--$10.

(lxxix) Serum, protein electrophoresis--$24.

(lxxx) Sodium--$9.

(lxxxi) T3 (Tri-iodothyronine) uptake--$11.50.

(lxxxii) T3, reverse--$45.

(lxxxiii) T3, total--$45.

(lxxxiv) Testosterone, total--$51.

(lxxxv) Thyriod peroxidate AB--$37.

(lxxxvi) Thyroxin, T4, total--$12.

(lxxxvii) Transferrin--$42.

(lxxxviii) Triglycerides--$10.

(lxxxix) Uric acid--$8.

(xc) Urinalysis with microscopic--$9.

(xci) Urinalysis without microscopic--$7.

(xcii) Urinalysis, auto, without microscopic--$9.

(xciii) Valprroic acid--$31.

(xciv) VMA, (vanillylmandelic acid)--$39.

(C) Cytology:

(i) Fine needle aspiration, evaluation--$100;

(ii) Liquid based pap smear--$33;

(iii) Non-Gyn, smear, routine--$56;

(iv) Pap smear--$12;

(v) Pap smear with hormone evaluation--$112;

(vi) Pap smear, pathologist--$12; and

(vii) Pneumocystis, over 5 slides--$112.

(D) DNA (Deoxyribonucleic acid) analysis:

(i) Beta-Globin 6 mutation panel (HbS, HbC, Hb E, HbD, Beta-Thalassemias-29 and -88)--$150;

(ii) Beta-Globin 5 mutation panel (HbS, HbC, Hb E, Beta-Thalassemias-29 and -88)--$138;

(iii) Hemoglobin S and C mutation Test--$88;

(iv) Hemoglobin E mutation test--$88;

(v) Beta-Thalassemia-29 and--88 mutation test--$100;

(vi) Beta-Thalassemia-29 mutation test--$63;

(vii) Beta-Thalassemia-88 mutation test--$63;

(viii) Hemoglobin D mutation test--$63;

(ix) Beta-Globin sequencing (from 105 of cap site to IVS-1-60)--$188;

(x) Beta-Globin sequencing (from 105 of cap site to IVS-1-60) added to another test--$100;

(xi) Galactosemia--$506;

(xii) Galactosemia, DNA carrier analysis of family member--$206;

(xiii) Phenylketonuria--$600; and

(xiv) Phenylketonuria, DNA carrier analysis of family member--$206.

(E) Drugs:

(i) Amikacin level--$155;

(ii) Blood alcohol--$19;

(iii) DHEAs--$82;

(iv) Dioxin drug level--$23;

(v) Dilantin (phenytoin) drug level--$23;

(vi) Drugs of abuse screens, urine:

(I) 1 drug--$19;

(II) 3 drugs--$58; and

(III) 7 drugs--$135.

(vii) Gentamicin level--$29;

(viii) Insulin level--$20;

(ix) Isoniazid (INH), urine test, qualitative--$62;

(x) Lithium level--$13;

(xi) Phenobarbital level--$20;

(xii) Procainamide, NAPA drug level--$66;

(xiii) Quinidine level--$25;

(xiv) Salicylate level--$18;

(xv) Tegretol (Carbemazepine) level--$17;

(xvi) Theophylline (aminophylline) level--$25;

(xvii) Tobramycin level--$29; and

(xviii) Vancomycin level--$31.

(F) Genetics:

(i) alpha fetoprotein (AFP)--$31;

(ii) β-human chorionic gonadotropin (β-HCG)--$16;

(iii) unconjugated estriol-3 (UE3)--$22; and

(iv) triple screen, includes β-HCG, UE3, and AFP--$63.

(G) Mycobacteriology/mycology.

(i) Acid fast bacillus (AFB):

(I) amplification only--$69;

(II) concentration, any source--$12;

(III) culture, any source--$26;

(IV) culture probe only--$44;

(V) drug susceptibility studies:

(-a-) direct susceptibility, each drug--$10;

(-b-) disk method--$23;

(-c-) indirect susceptibility, each drug--$10;

(-d-) level 1 drugs:

(-1-) Ciprofloxacin--$100;

(-2-) Ethionamide--$100;

(-3-) Isoniazid--$100;

(-4-) Ofloxacin--$100;

(-5-) PAS (p-aminosalicylic acid)--$100;

(-6-) Pyrazinamide--$100; and

(-7-) Rifampin--$100.

(-e-) level 2 drugs:

(-1-) Azithromycin--$100;

(-2-) Clofazamine--$100;

(-3-) Cycloserine--$100;

(-4-) Ethambutol--$100;

(-5-) Kanamycin--$100; and

(-6-) Streptomycin--$100.

(-f-) level 3 drug, Capreomycin--$100;

(-g-) MIC (minimum inhibitory concentration)--$35;

(-h-) primary panel--$75; and

(-i-) secondary panel--$163.

(VI) identification, referred isolates--$31;

(VII) smear and culture--$56; and

(VIII) smear only--$19.

(ii) Direct High Performance Liquid Chromatography (HPLC)--$31.

(iii) Fungus:

(I) reference:

(-a-) culture--$75;

(-b-) identification--$69;

(-c-) identification, gen probe--$51; and

(-d-) probe only--$44.

(II) clinical:

(-a-) culture, fungi, blood (isolation and presumptive I.D.)--$21;

(-b-) culture, fungi, definitive I.D., mold--$25;

(-c-) culture, fungi, definitive I.D., yeast--$25;

(-d-) culture, fungi, other source except blood, isolation and presumptive I.D.--$20;

(-e-) culture, fungi, skin, hair, nails, isolation and presumptive I.D.--$19;

(-f-) India ink smear--$15; and

(-g-) PAS, fungal smear--$17.

(iv) *M. kansasii* susceptibility, Rifampin--$13.

(H) Newborn screening--$40. (Fees are based on the newborn screening specimen collection kit described in §73.21 of this title (relating to Newborn Screening), which includes the cost of screening).

(I) Parasitology.

(i) Blood/tissue parasites--$156.

(ii) *Cryptosporidium* preparation acid fast smear--$12.

(iii) *Cryptosporidium screen, stool*--$13.

(iv) Intestinal parasites--$119.

(v) Parasite culture--$169.

(vi) Pinworm swab--$31.

(vii) Worm identification--$44.

(J) Serology.

(i) Amoebic antibody--$31.

(ii) Anti-DNA, double stranded--$34.

(iii) ANA (antinuclear antibody)--$28.

(iv) Arbovirus:

(I) immunoglobulin G (IgG)--$63;

(II) immunoglobulin M (IgM)-$88; and

(III) panel--$150.

(v) *Aspergillus*--$31.

(vi) ASO (antistreptolysin O)--$21.

(vii) ASO (antistreptolysin O) titer--$21.

(viii) *Brucella*--$16.

(ix) C4 Complement, quantitative--$29.

(x) Cat scratch fever (*Bartonella*)--$50.

(xi) CH 50 Complement, total qualitative--$29.

(xii) C-reactive protein, quantative--$11.

(xiii) Culture typing, immunofluorescent method--$12.

(xiv) Cytomegalovirus (CMV):

(I) IgG--$38;

(II) IgM--$44; and

(III) panel--$44.

(xv) Epstein-Barr panel--$156.

(xvi) Epstein-Barr virus antibody--$63.

(xvii) *Erlichia*--$50.

(xviii) FTA (fluorescent triponemal antibody) only--$38.

(xix) Fungus:

(I) identification--$69; and

(II) panel--$88.

(xx) Hantavirus, IgG/IgM--$94.

(xxi) *Heliobacter pylori*--$48.

(xxii) Hepatitis A:

(I) IgM--$56; and

(II) total--$13.

(xxiii) Hepatitis B:

(I) core total antibody--$38;

(II) core IgM antibody--$56;

(III) surface antibody (Ab)--$19; and

(IV) surface antigen (Ag)--$20.

(xxiv) Hepatitis B e Ab--$25.

(xxv) Hepatitis B e Ag--$19.

(xxvi) Hepatitis C (HCV)--$15.

(xxvii) Hepatitis C (RIBA)--$175.

(xxviii) Acute (comprehensive) hepatitis panel--$63.

(xxix) Herpes test, rapid method--$31.

(xxx) HSV (Herpes Simplex Virus) I, IgG AB--$128.

(xxxi) HSV I and II, IgG AB--$128.

(xxxii) HSV IgM AB with reflex titer--$128.

(xxxiii) HSV II IgG AB--$128.

(xxxiv) Human immunodeficiency virus (HIV):

(I) confirmation--$44;

(II) oral HIV, Orasure--$62;

(III) screen--$13; and

(IV) viral load--$175.

(xxxv) HIV/HCV panel--$28.

(xxxvi) Immunoglobulins, quantitative, IgG, IgA, IgM--$54.

(xxxvii) *Legionella*--$69.

(xxxviii) Lyme (*Borrelia*) IgG/IgM panel--$60.

(xxxix) Malaria antibody--$31.

(xl) Miscellaneous serological tests--$38.

(xli) Mononucleosis screen--$18.

(xlii) Mumps:

(I) IgG--$38; and

(II) IgM--$38.

(xliii) Mycoplasma antibody panel--$26.

(xliv) Parvovirus B-19, IgG/IgM--$75.

(xlv) Plague (*Yersinia*)--$19.

(xlvi) Q-fever--$63.

(xlvii) Rheumatoid factor--$11.

(xlviii) *Rickettsia* Panel--$69.

(xlix) *Rickettsia*/*Ehrlichia* Panel--$119.

(l) RPR (rapid plasma reagent test)--$6.00.

(li) RPR/syphilis confirmation--$16.

(lii) Rubella:

(I) IgG--$19;

(II) IgM--$38; and

(III) screen--$9.00.

(liii) Rubeola:

(I) IgG--$38; and

(II) IgM--$44. (liv) Toxoplasmosis:

(liv) Toxoplasmosis:

(I) IgG--$50; and

(II) IgM--$50.

(lv) Tularemia (*Francisella*)--$56.

(lvi) *Varicella zoster*--$56.

(lvii) VDRL (venereal disease research laboratory) test--$28.

(K) Surgical pathology:

(i) Level I, Global--$24;

(ii) Level II, Global--$60;

(iii) Level III, Global--$74;

(iv) Level IV, Global--$112;

(v) Level V, Global--$156; and

(vi) Level VI, Global--$227.

(L) Virology.

(i) *Chlamydia* culture--$100.

(ii) *Dengue* isolation--$100.

(iii) Electron microscope studies only--$356.

(iv) Herpes simplex isolation--$106.

(v) Influenza:

(I) surveillance--$156; and

(II) subtyping--$131.

(vi) Virus:

(I) viral detection by PCR--$125;

(II) virus identification on submitted isolate (reference specimen)--$313; and

(III) virus isolation, comprehensive--$263.

(2) Non-human specimens.

(A) Bacteriology.

(i) Environmental:

(I) Swabs--$31;

(II) *Legionella*--$88;

(III) bioterrorism--$250;

(IV) bioterrorism smear--$19;

(V) thermometer calibration--$38; and

(VI) weight calibration--$38.

(ii) Food.

(I) Bioterrorism--$250.

(II) Botulism (*C. botulinum*)--$150.

(III) Pathogen panel:
(-a-) basic--$144; and
(-b-) complex--$350;

(IV) Single organism--$56.

(V) Standard plate count--$31.

(VI) Toxin--$56.

(iii) Milk and dairy products.

(I) Dairy, cultured--$44.

(II) Ice cream--$88.

(III) Milk:
(-a-) pasteurized milk panel--$119;
(-b-) raw milk panel--$150; and
(-c-) single test--$88.

(iv) Seafood:

(I) brevitoxin--$250;

(II) fecal coliform--$50;

(III) standard plate count--$44; and

(IV) *Vibrios*--$75.

(v) Water.

(I) Bay waters--$38.

(II) Coliform:
(-a-) fecal--$38; and
(-b-) coliform, total--$50.

(III) Potable water--$31.

(IV) Reagent water suitability--$113.

(B) Entomology.

(i) Insect examination, Chaga's disease--$31.

(ii) Insect identification--$25.

(iii) Mosquito identification:

(I) adult, per carton--$63; and

(II) larvae, per vial--$56.

(C) Parasitology. Water filter examination--$219.

(D) Serology.

(i) Arbovirus, equine, includes western equine encephalitis (WEE); eastern equine encephalitis (EEE); and west nile virus (WNV)--$63.

(ii) Hantavirus, animal--$94.

(iii) Plague (*Yersinia*), animal--$19.

(E) Virology.

(i) Arbovirus isolation:

(I) avian--$44; and

(II) mosquito--$75; and

(III) equine--$44.

(ii) Arbovirus PCR:

(I) avian--$313; and

(II) mosquito--$313.

(iii) Rabies testing--$81.

(iv) Rabies virus typing:

(I) molecular--$156; and

(II) monoclonal--$44.

(3) Handling fees.

(A) Clinical specimens and environmental samples--$38; and

(B) Pathogenic agents--$75.

(4) Service charges.

(A) A service charge of $15 will be added for work performed after hours (Monday-Friday 5:30 p.m. to 6:00 a.m. and Saturday and Sundays 12:00 p.m. to 7:00 a.m.).

(B) An additional charge of $15 will be added for after hours STAT analysis.

(C) A fee not to exceed $5 will be charged for venipuncture.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 21, 2006.

TRD-200606871
Cathy Campbell
General Counsel
Department of State Health Services
Effective date: January 10, 2007
Proposal publication date: July 21, 2006
For further information, please call: (512) 458-7111 x6972

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 7. TEXAS COMMISSION ON LAW ENFORCEMENT OFFICER STANDARDS AND EDUCATION

CHAPTER 215. TRAINING AND EDUCATIONAL PROVIDERS AND RELATED MATTERS

37 TAC §215.1

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts an amendment to Title 37, Texas Administrative Code §215.1, Licensing of Training Providers. This adoption is without changes to the proposed text as published in the October 20, 2006, issue of the *Texas Register* (31 TexReg 8622) and will not be republished.

Adopted amendments were made to subsection (b)(2) to increase the time period for contractual training provider agreements from two (2) years to five (5) years. Subsection (d) is amended to reflect the effective date for these changes.

No comments were received.

This section is adopted for amendment under Texas Occupations Code, Chapter 1701, §1701.151 General Powers which authorized the Commission to promulgate rules for administration of this chapter.

The rule amendment as adopted is in compliance with Texas Occupations Code §1701.251, Training Programs; Instructors.

No other code, article, or statute is affected by this adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 18, 2006.

TRD-200606801
Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Effective date: January 7, 2007
Proposal publication date: October 20, 2006
For further information, please call: (512) 936-7717

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37 TAC §215.9

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts an amendment to Title 37, Texas Administrative Code §215.9, Training Coordinator. This adoption is without changes to the proposed text as published in the October 20, 2006, issue of the *Texas Register* (31 TexReg 8623) and will not be republished.

Adopted amendments to subsection (d) is changed to allow upon petition of the chief administrator, the executive director to waive the requirement for a full-time paid training coordinator if the training provider does not employ a full-time paid staff. Subsection (e) is added to reflect effective date of change.

No comments were received.

This section is adopted for amendment under Texas Occupations Code, Chapter 1701, §1701.151 General powers which authorized the Commission to promulgate rules for administration of this chapter.

The rule amendment as adopted is in compliance with Texas Occupations Code §1701.1701.251 Training Programs; Instructors.

No other code, article, or statute is affected by this adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 18, 2006.

TRD-200606802
Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Effective date: January 7, 2007
Proposal publication date: October 20, 2006
For further information, please call: (512) 936-7717

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CHAPTER 219. PRELICENSING AND REACTIVATION COURSES, TESTS, AND ENDORSEMENTS

37 TAC §219.2

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts a new rule to Title 37, Texas Administrative Code, §219.2, Reciprocity for Out-of-State Peace Officers and Federal Criminal Investigators. This adoption is without changes to the proposed text as published in the October 20, 2006, issue of the *Texas Register* (31 TexReg 8623) and will not be republished.

This adopted new rule sets out the procedure for which an out-of-state peace officer or federal criminal investigators may become eligible to apply for and be issued an endorsement to take the state peace officer licensing examination. This rule is created to specifically address and provide clarity and guidance to individuals who seek to become Texas peace officers.

No comments were received.

This section is adopted under Texas Occupations Code, Chapter 1701, §1701.151, General Powers, which authorized the Commission to promulgate rules for administration of this chapter.

The new rule as adopted is in compliance with Texas Occupations Code, §1701.304, Examination.

No other code, article, or statute is affected by this adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 18, 2006.

TRD-200606803
Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Effective date: January 7, 2007
Proposal publication date: October 20, 2006
For further information, please call: (512) 936-7717

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CHAPTER 221. PROFICIENCY CERTIFICATES AND OTHER POST-BASIC LICENSES

37 TAC §221.33

The Texas Commission on Law Enforcement Officer Standards and Education (Commission) adopts a new rule amendment to Title 37, Texas Administrative Code §221.33, Standardized Field Sobriety Testing (S.F.S.T.) Instructor Proficiency. This adoption is without changes to the proposed text as published in the October 20, 2006, issue of the *Texas Register* (31 TexReg 8624) and will not be republished.

This adopted new rule amendment establishes the requirements for Standardized Field Sobriety Testing (S.F.S.T.) Instructor Proficiency.

No comments were received.

This section is adopted for amendment under Texas Occupations Code, Chapter 1701, §1701.151 General Powers which authorized the Commission to promulgate rules for administration of this chapter.

The rule amendment as adopted is in compliance with Texas Occupations Code §1701.402, Proficiency Certificates.

No other code, article, or statute is affected by this adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 18, 2006.

TRD-200606804
Timothy A. Braaten
Executive Director
Texas Commission on Law Enforcement Officer Standards and Education
Effective date: January 7, 2007
Proposal publication date: October 20, 2006
For further information, please call: (512) 936-7717

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 20. TEXAS WORKFORCE COMMISSION

CHAPTER 801. LOCAL WORKFORCE DEVELOPMENT BOARDS
SUBCHAPTER B. ONE-STOP SERVICE DELIVERY NETWORK

40 TAC §801.33

The Texas Workforce Commission (Commission) adopts the following new section to Chapter 801, relating to Local Workforce Development Boards, without changes to the proposed text as published in the September 29, 2006, issue of the *Texas Register* (31 TexReg 8231):

Subchapter B, One-Stop Service Delivery Network, §801.33

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

The purpose of the adopted new rule is to implement Senate Bill (SB) 998, enacted by the 79th Texas Legislature, Regular Session (2005), which amends Texas Government Code §2308.264(e)(4) to allow entities that contract with Local Workforce Development Boards (Boards) to use, display, and advertise their business names when providing one-stop workforce services for a Board.

SB 998 directs the Commission to adopt rules that are applicable to any existing and future contracts for one-stop workforce services to ensure that any entity contracting with a Board may use, display, and advertise its business name when providing one-stop workforce services for the Board. Each contractor is

responsible for determining if they want to use, sell, or advertise their business name. It is not the Board's responsibility to modify any written material to include the business names of its contractors. Boards must require, through local policy, that each contractor notify the Board of its intent to use, display, or advertise its business name when providing one-stop workforce services.

Texas Government Code Chapter 2308 and this chapter govern Boards. The Commission adopts new §801.33, relating to Advertising, to Chapter 801, Subchapter B, One-Stop Service Delivery Network.

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS

SUBCHAPTER B. ONE-STOP SERVICE DELIVERY NETWORK

The Commission adopts the following new section:

§801.33. Advertising.

Section 801.33(a) requires that within 120 days of the effective date of this rule or within three Board meetings, Boards must develop policies that specify the limitations and restrictions regarding the use, display, and advertising of contractors' business names when providing one-stop workforce services for the Boards. These policies will be applicable only in the event that a contractor or prospective contractor requests to advertise.

Section 801.33(a)(1) states that a Board's policies must address the requirement that a contractor's business name be displayed in a subordinate position to the Board's name in terms of size, placement, stature, and location.

Section 801.33(a)(1)(A) states that a Board's policies must address the advertising medium to be used, such as the Internet, radio, television, and print.

Section 801.33(a)(1)(B) states that a Board's policies must address the design of the advertising medium.

Section 801.33(a)(2) requires a Board to develop a local policy that requires contractors and prospective contractors to provide the Board advance written notice of their intent to use, display, or advertise their business name. For example, a Board may require contractors to provide 30-days written notice if they intend to use, display, or advertise their business name. In addition, a Board may include a provision in a Request for Proposals that prospective contractors state their intent to advertise in the proposal.

Section 801.33(a)(3) requires Boards to develop policies prohibiting a contractor's or prospective contractor's business-name recognition from being a factor in evaluating a proposal for services.

Section 801.33(a)(4) states that a Board's policies must address the limitations necessary to avoid potential confusion of employers and job seekers attempting to access one-stop workforce services. Boards, as well as the entire Texas workforce system, maintain a vested interest in controlling and protecting the business relationships developed with local employers and the goodwill developed with job seekers and the public. An advertising strategy that creates customer confusion potentially makes one-stop workforce services inaccessible to employers and job seekers--if customers cannot find your business, they cannot access your services. Among other things, customer confusion prevents an efficient and effective labor exchange between employers and job seekers, thus undermining a critical, core mission of the Texas workforce system. When developing policies to address contractor advertising, Boards also should consider events such as contractor turnover, which may create a significant negative impact on the continuity of a Board's image if the contractor's brand dominates to the detriment of the Board brand. A Board's advertising policy:

--may direct how contractor staff outreaches and communicates with employers;

--will establish parameters that align with its branding strategy; and

--may allow a contractor's business name to be advertised in print material only, by limiting greetings or introductions to the Board's brand.

Section 801.33(a)(5) states that a Board's policies must address the methods of holding contractors accountable. A Board may include a provision on adherence to its advertising policies in existing and future contracts for one-stop workforce services.

Section 801.33(a)(6) states that a Board's policies must address how a contractor or prospective contractor will address the requirement that Commission-contracted funds must not be used for advertising. The Board's policies must require the contractor or prospective contractor to disclose the source of funds to be used for advertising. The Board's policies must also require an attestation from the contractor or prospective contractor that no Commission-contracted funds will be used for advertising.

Section 801.33(b) requires that Commission-contracted funds must not be used for costs associated with advertising the contractor's business name. Boards and contractors are prohibited from using these funds to pay for costs such as displaying the contractor's business name on materials used in performing contracted duties; replacing the contractor's unused advertising materials; and removing the contractor's business name from signs remaining on a Texas Workforce Center's premises.

Section 801.33(c) allows Boards to charge an outgoing contractor for the cost of replacing unused materials containing the outgoing contractor's business name and the cost of removing the outgoing contractor's business name from signs remaining on a Texas Workforce Center's premises.

Section 801.33(d) requires Boards to be the final decision-making authority related to Boards' policies on contractor advertising. As a result, there will be no appeal to the Commission.

No comments were received regarding the new rule.

The Agency hereby certifies that the rule has been reviewed by legal counsel and found to be within the Agency's legal authority to adopt.

The rule is adopted under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The adopted rule affects Texas Labor Code, particularly Chapters 301 and 302, as well as Texas Government Code Chapter 2308.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 19, 2006.

TRD-200606822
Reagan Miller
Deputy Director for Workforce and UI Policy
Texas Workforce Commission
Effective date: January 8, 2007
Proposal publication date: September 29, 2006
For further information, please call: (512) 475-0829

♦ ♦ ♦

TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure 1: 1 TAC §81.60(1)

The State of Texas

Elections Division
P.O. Box 12060
Austin, Texas 78711-2060
www.sos.state.tx.us

Phone: 512-463-5650
Fax: 512-475-2811
TTY: 7-1-1
(800) 252-VOTE (8683)

Application for Texas Certification of Voting System - Form 100

Name of Company	
Voting System Name and Release #	
Street Address, City, State, Zip	
Contact Name & Title	
Phone Number	
Fax Number	
E-Mail Address	

	Component Submitted for Certification	Version/ Firmware #	Previous Texas Certification Date*	EAC/NASED Qualification Date for this Version	EAC/NASED Qualification Number for this Version
1					
2					
3					
4					
5					
6					
7					
8					
9					
10					
11					
12					
13					
14					

*For the most recent certification, or state "None"

Materials Checklist (Indicate materials submitted with an "X")

7 copies of the following (5 copies in electronic format and 2 hard copies):	
	Completed application Forms 100 and Form 101
	If applicable, attach Form 100 - Schedule A, listing recommendations/issues made from previous Texas examination. List how they have been corrected or addressed. If the have not, explain why.
	If component has been modified, include log detailing changes from the previously Texas certified version
	Nationally accredited voting system test laboratory reports of all tests (including summary) conducted on items submitted
	Operating Manual(s)
	Maintenance Manual(s)
	Training Manual(s)
	Technical Specifications
	Operational Specifications
	List all COTS hardware/software used with the system and their version numbers – If listed in a nationally accredited test laboratory reports, state where
	List all configurations that will be marketed and sold in Texas - indicate if the optical scan will be used as a precinct count, central count, or both
	Provide complete step-by-step installation instructions for all software installs and configurations specific to Texas
	List of other election jurisdictions where system is in use or has been in use

Acknowledge which ITA has been notified to send 4 copies of the software and source code and expected delivery date to our office.

Nationally accredited voting system test laboratory Name	**Delivery Date**

Signature of Person Making Request	**Title**	**Date**

Please submit the certification fee and all relevant materials to:

Irene Diaz
Elections Division
P.O. Box 12060
Austin, Texas 78711-2060

Figure 2: 1 TAC §81.60(1)

The State of Texas

Elections Division
P.O. Box 12060
Austin, Texas 78711-2060
www.sos.state.tx.us

Phone: 512-463-5650
Fax: 512-475-2811
TTY: 7-1-1
(800) 252-VOTE (8683)

Roger Williams
Assistant Secretary of State

VOTING SYSTEM CERTIFICATION – FORM 100 SCHEDULE A

	Component	Issue *	How Addressed
1			
2			
3			
4			
5			
6			
7			
8			
9			
10			

* From previous Texas examination(s)

Use additional sheets as necessary

Figure 3: 1 TAC §81.60(1)

The State of Texas

Elections Division
P.O. Box 12060
Austin, Texas 78711-2060
www.sos.state.tx.us

Phone: 512-463-5650
Fax: 512-475-2811
TTY: 7-1-1
(800) 252-VOTE (8683)

Roger Williams
Secretary of State

VOTING SYSTEM CERTIFICATION – FORM 101

The following questions must be answered with regard to each voting system being certified. Answers should be set forth on a separate sheet of paper and attached to this form. Explain how the voting system:

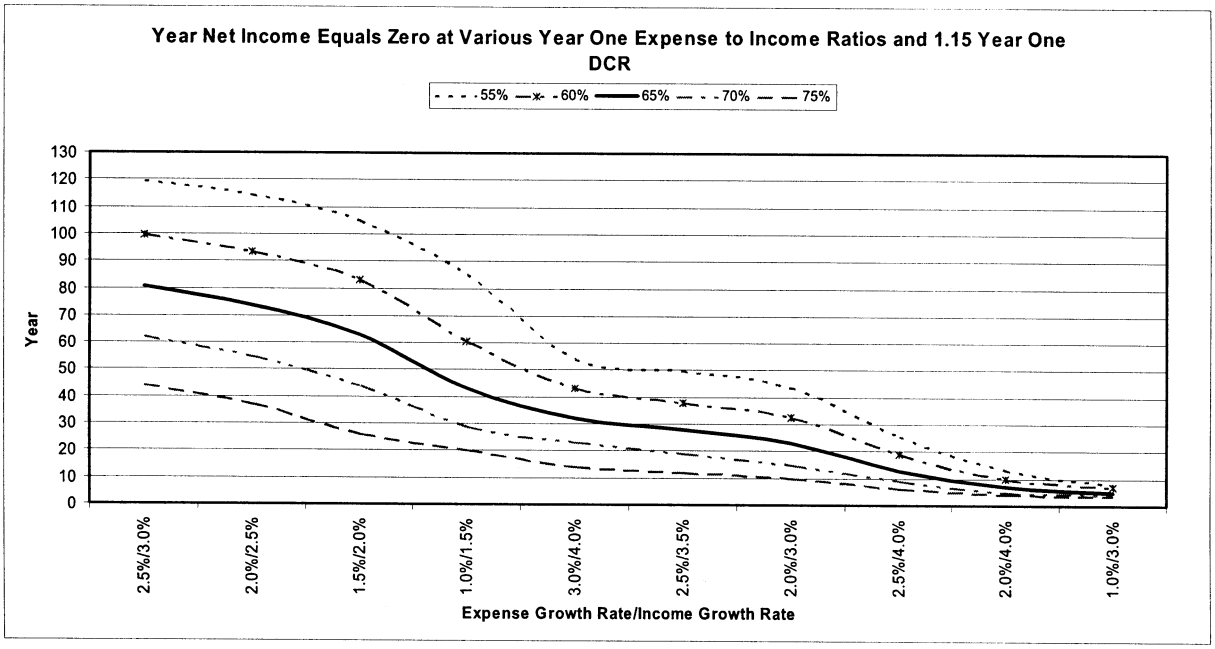
1. Preserves the secrecy of the ballot;
2. Is suitable for the purpose for which it is intended;
3. Operates safely, efficiently, and accurately;
4. Is safe from fraudulent or unauthorized manipulation;
5. Permits voting on all offices and measures to be voted on at an election;
6. Prevents counting votes on offices and measures on which the voter is not entitled to vote;
7. Prevents counting votes by the same voter for more than one candidate for the same office, and prevents counting votes for more than the number of candidates for which the voter is entitled to vote;
8. Prevents counting a vote on the same office or measure more than once;
9. Permits write-in voting;
10. Is capable of permitting straight-party voting;
11. Is capable of providing records from which the operation of the voting system may be audited; and
12. Is capable of producing a summary screen to allow voters to examine their choices before the ballot is finally cast; and
13. Is capable of producing a real-time audit log (Texas Administrative Code (TAC) § 81.62); and
14. Is capable of casting a blank ballot; and
15. (Electronic Ballot Image Systems (EX: DRE) only) List procedure for provisional voting or reference where this is in your documentation. (TAC § 81.176); and
16. (Electronic Ballot Image Systems (EX: DRE) only) List procedure for a recount (printing of electronic ballot images and audit logs); and
17. (Electronic Ballot Image Systems (EX: DRE) only) List procedure to backup electronic files created from the election (EX: electronic ballot images and audit logs, etc.)

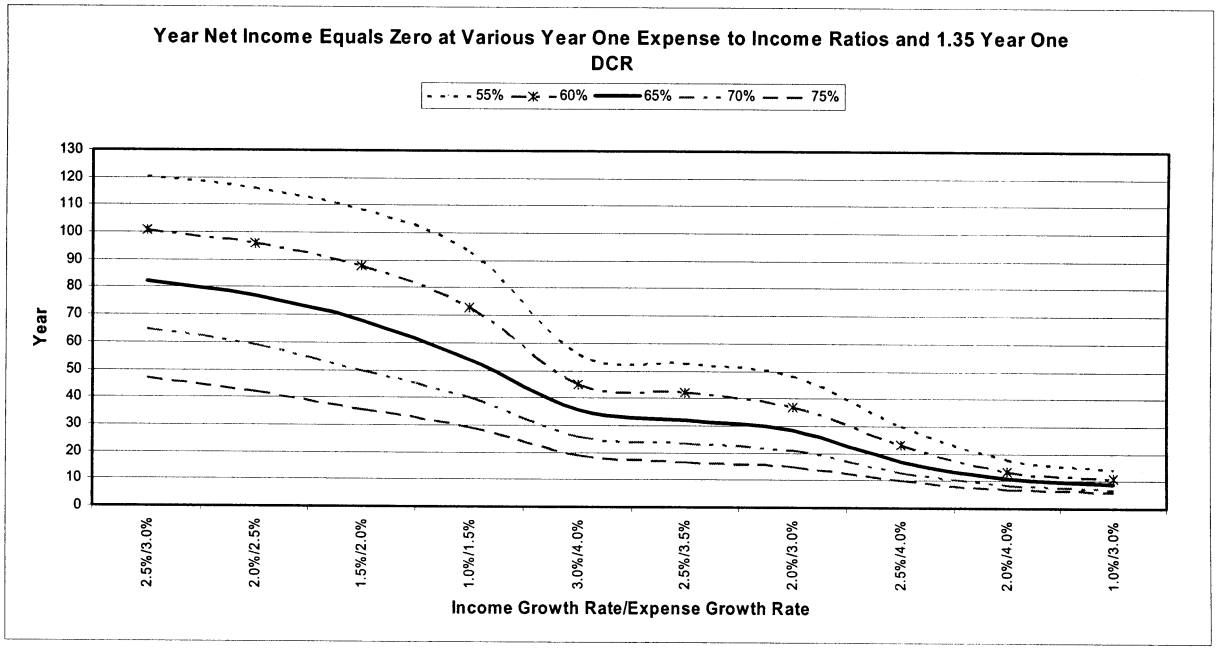
18. Procedures on how to properly shutdown equipment during early voting or reference where this is in your documentation; and

19. (Precinct Optical Scanners only) Can two locks be placed on the ballot box to make it legal to use at an early voting site? If so, please list how a jurisdiction can have this done; and

20. Are your manufacturers ISO 9000 compliant? If not, explain quality control.

Figure: 10 TAC Chapter 1--Preamble





IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Comptroller of Public Accounts

Certification of the Average Taxable Price of Gas and Oil

The Comptroller of Public Accounts, administering agency for the collection of the Crude Oil Production Tax, has determined that the average taxable price of crude oil for reporting period November 2006, as required by Tax Code, §202.058, is $56.15 per barrel for the three-month period beginning on August 1, 2006, and ending October 31, 2006. Therefore, pursuant to Tax Code, §202.058, crude oil produced during the month of November 2006, from a qualified Low-Producing Oil Lease, is not eligible for exemption from the crude oil production tax imposed by Tax Code, Chapter 202.

The Comptroller of Public Accounts, administering agency for the collection of the Natural Gas Production Tax, has determined that the average taxable price of gas for reporting period November 2006, as required by Tax Code, §201.059, is $5.69 per mcf for the three-month period beginning on August 1, 2006, and ending October 31, 2006. Therefore, pursuant to Tax Code, §201.059, gas produced during the month of November 2006, from a qualified Low-Producing Well, is not eligible for exemption from the natural gas production tax imposed by Tax Code, Chapter 201.

Inquiries should be directed to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711-3528.

TRD-200606872
Martin Cherry
Chief Deputy General Counsel
Comptroller of Public Accounts
Filed: December 21, 2006

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Texas Education Agency

Notice of Texas Education Agency Security Environment (TEA SE) Access Required for English Literacy and Civics Education Program 2007-2008 eGrants Application

English Literacy and Civics Education. The competitive grant application for the English Literacy and Civics Education Program will only be available in the Texas Education Agency (TEA) eGrants system, with an expected publication date of March 1, 2007. All external customers and users anticipating a need to access the eGrants system to submit a competitive application under the English Literacy and Civics Education Program, or those who anticipate being part of a shared services arrangement, must have a username and password for the Texas Education Agency Secure Environment (TEA SE) in order to access the eGrants system. Participants are encouraged to request TEA SE access no later than February 23, 2007, in order to obtain a TEA SE username and password in a timely manner.

Any users who have previously applied for an eGrants TEA SE username and password do not need to reapply. However, users are encouraged to review the role previously requested for their eGrants username and password to ensure it is appropriate. If the role is not correct, users will need to submit a new eGrants TEA SE access request form indicating the change in role. If a username and password were assigned to an individual who should no longer have access, please complete the eGrants TEA SE access form to delete system access for that individual.

A TEA SE username and password are required for each user of eGrants, including authorized officials such as superintendents and executive directors who submit grant applications, employees or contractors who will assist in writing/completing applications in eGrants, and grant personnel who will be completing project progress reports in eGrants. For each user, a single TEA SE username and password is valid for all eGrants applications and is not limited to any one specific grant. Privileges listed under a role apply to all grants and progress/results reports.

To request a username and password, go to http://www.tea.state.tx.us/forms/tease/egrants_ext.htm.
Information on how to apply for eGrants access can be found at http://www.tea.state.tx.us/opge/egrant/.

Training Available on Texas Education Telecommunication Network (TETN). TEA is offering training via TETN (TETN Event #24561) on Thursday, March 1, 2007, from 1:00 p.m. to 4:00 p.m. This training will cover the English Literacy and Civics Education Program grant application and will provide the opportunity for questions and answers. As space is limited, individuals planning to attend the event must reserve seating with their regional education service center. A map of regions and contact information for each education service center can be accessed on the TEA website at http://www.tea.state.tx.us/ESC/.

Further Information. For clarifying information about this notice, contact Carlos Garza, Division of Discretionary Grants, Texas Education Agency, (512) 463-9269.

TRD-200606888
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Filed: December 21, 2006

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Texas Commission on Environmental Quality

Enforcement Orders

A default order was entered regarding Grover G. Bruce, Jr., Docket No. 2002-1186-LII-E on December 11, 2006 assessing $625 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Laurencia Fasoyiro, Staff Attorney at (713) 422-8914, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding C.L. Hall dba Southfork Dairy and Douglas Hall, Docket No. 2003-0523-AGR-E on December 11, 2006 assessing $10,140 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting James Sallans, Staff Attorney at (512) 239-2053, Texas

Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Sampri Investments, LLC dba Sammy's #4, Docket No. 2003-1292-PST-E on December 11, 2006 assessing $8,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Alfred Oloko, Staff Attorney at (713) 422-8918, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Igloo Products, Corp., Docket No. 2003-1357-IWD-E on December 11, 2006 assessing $2,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Kari Gilbreth, Staff Attorney at (512) 239-1320, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Mardoche Abdelhak dba Trailer City Water Co, Docket No. 2004-0237-PWS-E on December 11, 2006 assessing $578 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Kathleen Decker, Staff Attorney at (512) 239-6500, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Cal Farleys Girlstown USA, Docket No. 2004-1165-PST-E on December 11, 2006 assessing $2,500 in administrative penalties with $500 deferred.

Information concerning any aspect of this order may be obtained by contacting Cheryl Thompson, Enforcement Coordinator at (817) 588-5886, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding W & W Fiberglass Tank Company, Docket No. 2004-1427-AIR-E on December 11, 2006 assessing $12,495 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Shannon Strong, Staff Attorney at (512) 239-0972, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Union Oil Company of California dba Unocal Beaumont Terminal, Docket No. 2004-1640-AIR-E on December 11, 2006 assessing $79,820 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Laurencia Fasoyiro, Staff Attorney at (713) 422-8914, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Marvin's Chevron Service Center, Inc. dba Marvin's Chevron, Docket No. 2005-0043-PST-E on December 11, 2006 assessing $3,150 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Alfred Oloko, Staff Attorney at (713) 422-8918, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Charles Cole dba Milestone Financial Ximena and dba Granbury Grocery & Gas, Docket No. 2005-0412-PST-E on December 11, 2006 assessing $1,400 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Justin Lannen, Staff Attorney at (817) 588-5927, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Live Oak Golf Country Club Inc., Docket No. 2005-0742-PWS-E on December 11, 2006 assessing $2,055 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Shana Horton, Staff Attorney at (512) 239-1088, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Calpine Corporation and Calpine Central, L.P., Docket No. 2005-0774-IWD-E on December 11, 2006 assessing $3,750 in administrative penalties with $750 deferred.

Information concerning any aspect of this order may be obtained by contacting Catherine Albrecht, Enforcement Coordinator at (713) 767-3672, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of China, Docket No. 2005-1089-MLM-E on December 11, 2006 assessing $5,023 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Jacquelyn Boutwell, Staff Attorney at (512) 239-5846, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Alfred Howard Smith, Docket No. 2005-1220-LII-E on December 11, 2006 assessing $1,750 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Lena Roberts, Staff Attorney at (512) 239-0019, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding 3M Company, Docket No. 2005-1783-AIR-E on December 11, 2006 assessing $5,450 in administrative penalties with $1,090 deferred.

Information concerning any aspect of this order may be obtained by contacting Jason Kemp, Enforcement Coordinator at (512) 239-5610, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Quail Valley Estates, Inc. dba Quail Valley Estates Mobile Homes, Docket No. 2005-1804-PWS-E on December 11, 2006 assessing $1,650 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Rachael Gaines, Staff Attorney at (512) 239-0078, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding JOPA Sports & Entertainment, Inc., Docket No. 2005-1826-PWS-E on December 11, 2006 assessing $3,875 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Shana Horton, Staff Attorney at (512) 239-1088, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Burlington Northern and Santa Fe Railway Company, Docket No. 2005-1891-IHW-E on December

11, 2006 assessing $4,000 in administrative penalties with $800 deferred.

Information concerning any aspect of this order may be obtained by contacting Thomas Greimel, Enforcement Coordinator at (512) 239-5690, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Miguel A. Lozano, Docket No. 2005-1935-MSW-E on December 11, 2006 assessing $3,875 in administrative penalties with $775 deferred.

Information concerning any aspect of this order may be obtained by contacting Colin Barth, Enforcement Coordinator at (512) 239-0086, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Federal Bureau of Prisons, Docket No. 2005-2030-AIR-E on December 11, 2006 assessing $840 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Robert Mosley, Staff Attorney at (512) 239-0627, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Intercontinental Water Supply Corporation, Docket No. 2006-0098-PWS-E on December 11, 2006 assessing $1,733 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Shana Horton, Staff Attorney at (512) 239-1088, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Kingwood Petroleum, LLC dba Country Boy Food Store 4, Docket No. 2006-0136-PST-E on December 11, 2006 assessing $23,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Robert Mosley, Staff Attorney at (512) 239-0627, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Macario Gonzalez, Jr., Docket No. 2006-0254-MSW-E on December 11, 2006 assessing $5,250 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Kathleen Decker, Staff Attorney at (512) 239-6500, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Tommy Hooton, Docket No. 2006-0416-MSW-E on December 11, 2006 assessing $3,150 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Kathleen Decker, Staff Attorney at (512) 239-6500, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Lanxess Corporation, Docket No. 2006-0602-AIR-E on December 11, 2006 assessing $4,080 in administrative penalties with $816 deferred.

Information concerning any aspect of this order may be obtained by contacting Kimberly Morales, Enforcement Coordinator at (713) 422-8938, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Graff Cleaners, Inc. dba Main Street Cleaners, dba Modern Cleaners, dba Presstige Cleaners, Docket No. 2006-0627-DCL-E on December 11, 2006 assessing $3,555 in administrative penalties with $711 deferred.

Information concerning any aspect of this order may be obtained by contacting Jorge Ibarra, Enforcement Coordinator at (817) 588-5890, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding I. B. Cheaper's, LP dba IB Cheapers Fuel & Beer Emporium, Docket No. 2006-0662-PST-E on December 11, 2006 assessing $10,350 in administrative penalties with $2,070 deferred.

Information concerning any aspect of this order may be obtained by contacting Thomas Greimel, Enforcement Coordinator at (512) 239-5690, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Austin, Docket No. 2006-0670-MWD-E on December 11, 2006 assessing $4,082 in administrative penalties with $816 deferred.

Information concerning any aspect of this order may be obtained by contacting Harvey Wilson, Enforcement Coordinator at (512) 239-0321, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Ann Vaughn, Docket No. 2006-0704-PST-E on December 11, 2006 assessing $1,500 in administrative penalties with $300 deferred.

Information concerning any aspect of this order may be obtained by contacting Rajesh Acharya, Enforcement Coordinator at (512) 239-0577, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Equistar Chemicals, LP, Docket No. 2006-0713-AIR-E on December 11, 2006 assessing $5,746 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Rebecca Johnson, Enforcement Coordinator at (713) 422-8931, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Jack Brown Cleaners, Inc. dba One Price Cleaners, Docket No. 2006-0719-DCL-E on December 11, 2006 assessing $1,955 in administrative penalties with $391 deferred.

Information concerning any aspect of this order may be obtained by contacting Harvey Wilson, Enforcement Coordinator at (512) 239-0321, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Chun Lee dba Quorum Cleaners, Docket No. 2006-0763-DCL-E on December 11, 2006 assessing $889 in administrative penalties with $178 deferred.

Information concerning any aspect of this order may be obtained by contacting Cari-Michel La Caille, Enforcement Coordinator at (512) 239-1387, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Robert Vincent Hart, Docket No. 2006-0776-PWS-E on December 11, 2006 assessing $210 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting David Van Soest, Enforcement Coordinator at (512) 239-

0468, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Amin M. Tirmizi dba Hassell's Cleaners, Docket No. 2006-0784-DCL-E on December 11, 2006 assessing $342 in administrative penalties with $68 deferred.

Information concerning any aspect of this order may be obtained by contacting Jorge Ibarra, Enforcement Coordinator at (817) 588-5890, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Summerside Cleaners Corporation, Docket No. 2006-0785-DCL-E on December 11, 2006 assessing $889 in administrative penalties with $178 deferred.

Information concerning any aspect of this order may be obtained by contacting Jorge Ibarra, Enforcement Coordinator at (817) 588-5890, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding S & A Lee Corporation dba Metrocrest Cleaners, Docket No. 2006-0786-DCL-E on December 11, 2006 assessing $1,185 in administrative penalties with $237 deferred.

Information concerning any aspect of this order may be obtained by contacting Cheryl Thompson, Enforcement Coordinator at (817) 588-5886, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Kee Ja Rhee dba Lone Star Cleaners, Docket No. 2006-0789-DCL-E on December 11, 2006 assessing $776 in administrative penalties with $155 deferred.

Information concerning any aspect of this order may be obtained by contacting Jorge Ibarra, Enforcement Coordinator at (817) 588-5890, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Gimmarino Group, Inc. dba Lapels Dry Cleaning, Docket No. 2006-0824-DCL-E on December 11, 2006 assessing $889 in administrative penalties with $178 deferred.

Information concerning any aspect of this order may be obtained by contacting Deana Holland, Enforcement Coordinator at (512) 239-2504, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Desi Services, Inc. dba Dixie Cleners, Docket No. 2006-0843-DCL-E on December 11, 2006 assessing $889 in administrative penalties with $178 deferred.

Information concerning any aspect of this order may be obtained by contacting Judy Kluge, Enforcement Coordinator at (817) 588-5825, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Emil B. Corporation dba One Hour Mac Cleaners, Whytes Cleaners, MacArthur Cleaners (Irving), and MacArthur Cleaners (Lewisville), Docket No. 2006-0890-DCL-E on December 11, 2006 assessing $4,090 in administrative penalties with $817 deferred.

Information concerning any aspect of this order may be obtained by contacting A. Sunday Udoetok, Enforcement Coordinator at (512) 239-2292, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Texas Lucky 7 Beer & Wine, Inc., Docket No. 2006-0898-PST-E on December 11, 2006 assessing $3,850 in administrative penalties with $770 deferred.

Information concerning any aspect of this order may be obtained by contacting Harvey Wilson, Enforcement Coordinator at (512) 239-0321, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Lide Industries, Inc., Docket No. 2006-0905-AIR-E on December 11, 2006 assessing $27,520 in administrative penalties with $5,504 deferred.

Information concerning any aspect of this order may be obtained by contacting Miriam Hall, Enforcement Coordinator at (512) 239-1044, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Karl Tatsch dba Hill Country Cleaners and Hill Country Cleaners & Laundry, Docket No. 2006-0919-DCL-E on December 11, 2006 assessing $2,370 in administrative penalties with $474 deferred.

Information concerning any aspect of this order may be obtained by contacting Dana Shuler, Enforcement Coordinator at (512) 239-2505, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Kingsville ISD, Docket No. 2006-0926-PST-E on December 11, 2006 assessing $1,750 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting David Van Soest, Enforcement Coordinator at (512) 239-0468, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Sohyon Park dba Canal Cleaners, Docket No. 2006-0964-DCL-E on December 11, 2006 assessing $889 in administrative penalties with $178 deferred.

Information concerning any aspect of this order may be obtained by contacting Cheryl Thompson, Enforcement Coordinator at (817) 588-5886, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Young Chol Kim dba Regency Cleaners, Docket No. 2006-0978-DCL-E on December 11, 2006 assessing $889 in administrative penalties with $178 deferred.

Information concerning any aspect of this order may be obtained by contacting Samuel Short, Enforcement Coordinator at (512) 239-5363, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding NIMI's, Inc. dba Ray Stuart's Cleaners, Docket No. 2006-0979-DCL-E on December 11, 2006 assessing $889 in administrative penalties with $178 deferred.

Information concerning any aspect of this order may be obtained by contacting Samuel Short, Enforcement Coordinator at (512) 239-5363, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding A & M Holding, Inc. dba Texas Wawa Food Mart, Docket No. 2006-0981-PST-E on December 11, 2006 assessing $6,222 in administrative penalties with $1,244 deferred.

Information concerning any aspect of this order may be obtained by contacting Rajesh Acharya, Enforcement Coordinator at (512) 239-0577, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Jennifer Nguyen dba Railyard Cleaners, Docket No. 2006-0991-DCL-E on December 11, 2006 assessing $1,185 in administrative penalties with $237 deferred.

Information concerning any aspect of this order may be obtained by contacting Rajesh Acharya, Enforcement Coordinator at (512) 239-0577, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Oxy Vinyls, LP, Docket No. 2006-1005-AIR-E on December 11, 2006 assessing $4,030 in administrative penalties with $806 deferred.

Information concerning any aspect of this order may be obtained by contacting Nadia Hameed, Enforcement Coordinator at (713) 767-3629, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Weldon W. Alders dba Texaba Subdivision, Docket No. 2006-1022-MLM-E on December 11, 2006 assessing $3,281 in administrative penalties with $656 deferred.

Information concerning any aspect of this order may be obtained by contacting Jorge Ibarra, Enforcement Coordinator at (817) 588-5890, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Ngocdung Thi Nguyen dba BP Cleaners, Docket No. 2006-1054-DCL-E on December 11, 2006 assessing $889 in administrative penalties with $178 deferred.

Information concerning any aspect of this order may be obtained by contacting Dana Shuler, Enforcement Coordinator at (512) 239-2505, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Hung Nguyen dba Super K Food Store, Docket No. 2006-1121-PST-E on December 11, 2006 assessing $4,500 in administrative penalties with $900 deferred.

Information concerning any aspect of this order may be obtained by contacting Rajesh Acharya, Enforcement Coordinator at (512) 239-0577, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Judy's Super Drycleaner, Inc. dba Conroe Super Dry Cleaners, Docket No. 2006-1124-DCL-E on December 11, 2006 assessing $889 in administrative penalties with $178 deferred.

Information concerning any aspect of this order may be obtained by contacting Libby Hogue, Enforcement Coordinator at (512) 239-1165, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Bark Investments, Inc. dba Classic Cleaners, Docket No. 2006-1166-DCL-E on December 11, 2006 assessing $1,185 in administrative penalties with $237 deferred.

Information concerning any aspect of this order may be obtained by contacting Thomas Greimel, Enforcement Coordinator at (512) 239-5690, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Kyu I. Robinson dba Kim's Alterations & Cleaning, Docket No. 2006-1167-DCL-E on December 11, 2006 assessing $889 in administrative penalties with $178 deferred.

Information concerning any aspect of this order may be obtained by contacting Jason Godeaux, Enforcement Coordinator at (512) 239-0739, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Kwang Sool Shin dba Bell Cleaners, Docket No. 2006-1182-DCL-E on December 11, 2006 assessing $1,209 in administrative penalties with $242 deferred.

Information concerning any aspect of this order may be obtained by contacting Rajesh Acharya, Enforcement Coordinator at (512) 239-0577, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Ha Kim Hoang Huy Le dba Star Dry Cleaning, Docket No. 2006-1224-DCL-E on December 11, 2006 assessing $203 in administrative penalties with $41 deferred.

Information concerning any aspect of this order may be obtained by contacting Rebecca Clausewitz, Enforcement Coordinator at (210) 403-4012, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Hoai Huong Nguyen dba Beh's Cleaners Alterations and Shoe Repair, Docket No. 2006-1249-DCL-E on December 11, 2006 assessing $1,185 in administrative penalties with $237 deferred.

Information concerning any aspect of this order may be obtained by contacting Cari-Michel La Caille, Enforcement Coordinator at (512) 239-1387, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding TRI State Electric, Ltd., Docket No. 2006-1260-AIR-E on December 11, 2006 assessing $1,200 in administrative penalties with $240 deferred.

Information concerning any aspect of this order may be obtained by contacting Daniel Siringi, Enforcement Coordinator at (409) 899-8799, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Sharon Dodd dba Hometown Cleaners, Docket No. 2006-1383-DCL-E on December 11, 2006 assessing $194 in administrative penalties with $39 deferred.

Information concerning any aspect of this order may be obtained by contacting Judy Kluge, Enforcement Coordinator at (817) 588-5825, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Song Choe Bracamonte dba Song's Cleaners, Docket No. 2006-1478-DCL-E on December 11, 2006 assessing $889 in administrative penalties with $178 deferred.

Information concerning any aspect of this order may be obtained by contacting Judy Kluge, Enforcement Coordinator at (817) 588-5825, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding John Baig dba Lucky Food Center, Docket No. 2006-1753-PST-E on December 11, 2006 assessing $1,750 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Steven Lopez, Enforcement Coordinator at (512) 239-1896, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding CLW, Inc., Docket No. 2006-1794-WQ-E on December 11, 2006 assessing $875 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Steven Lopez, Enforcement Coordinator at (512) 239-1896, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding PNH Star Enterprises, Inc. dba Dry Clean USA, Docket No. 2006-0794-DCL-E on December 11, 2006 assessing $1,067 in administrative penalties with $213 deferred.

Information concerning any aspect of this order may be obtained by contacting Jorge Ibarra, Enforcement Coordinator at (817) 588-5890, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Webera, Inc. dba Max Dry Clean Super Store, Docket No. 2006-1167-DCL-E on December 11, 2006 assessing $1,185 in administrative penalties with $237 deferred.

Information concerning any aspect of this order may be obtained by contacting Judy Kluge, Enforcement Coordinator at (817) 588-5825, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default and shutdown order was entered regarding Eco Himal Incorporated dba Denton Food Mart, Docket No. 2005-1832-PST-E on December 11, 2006 assessing $3,570 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Deanna Holland, Enforcement Coordinator at (512) 239-2504, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An order was entered regarding Hussain Ali, Docket No. 2004-1868-PST-E on December 12, 2006 assessing $3,150 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Jason Kemp, Enforcement Coordinator at (512) 239-5610, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

TRD-200606857
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: December 20, 2006

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Notice of Comment Period and Hearing on Draft Air Curtain Incinerator General Operating Permit

The Texas Commission on Environmental Quality (TCEQ) is providing an opportunity for public comment and a notice and comment hearing (hearing) on the draft Air Curtain Incinerator (ACI) General Operating Permit (GOP) Number 518. The draft GOP contains codified applicable requirements for Title V major and minor, permanent and temporary source ACI units, as required by Title 30 Texas Administrative Code Chapter 122 (General Operating Permits).

The draft GOP is subject to a 30-day comment period. During the comment period, any person may submit written comments on the draft GOP. A hearing will be held in Austin on February 6, 2007, at 10:00 a.m. in Room 131E of TCEQ, Building C, located at 12100 Park 35 Circle, Austin. The hearing will be structured for the receipt of oral or written comments by interested persons. Individuals may present statements when called upon in order of registration. Open discussion within the audience will not occur during the hearing; however, a TCEQ staff member will be available to discuss the draft GOP 30 minutes prior to the hearing and will also be available to answer questions after the hearing.

Copies of the draft GOP may be obtained from the TCEQ Web site at *http://www.tceq.state.tx.us/permitting/air/nav/air_genoppermits.html* or by contacting the TCEQ Office of Permitting, Remediation and Registration, Air Permits Division at (512) 239-1250. Written comments may be mailed to Ms. Beryl Thatcher, Texas Commission on Environmental Quality, Office of Permitting, Remediation and Registration, Air Permits Division, MC 163, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-1070. All comments should reference the draft GOP. Comments must be received by 5:00 p.m., February 9, 2007. For further information, contact Ms. Thatcher at (512) 239-5374.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact the agency at (512) 239-4000. Requests should be made as far in advance as possible.

TRD-200606892
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: December 22, 2006

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Notices of District Petition

Notices issued December 18, 2006

TCEQ Internal Control No. 07032006-D01; Moody Simmons Katy Gaston, Ltd. (Petitioner) filed a petition for creation of Fort Bend County Municipal Utility District No. 163 (District) with the Texas Commission on Environmental Quality (TCEQ). The petition was filed pursuant to Article XVI, Section 59 of the Constitution of the State of Texas; Chapters 49 and 54 of the Texas Water Code; 30 Texas Administrative Code Chapter 293; and the procedural rules of the TCEQ. The petition states the following: (1) the Petitioner holds title to a majority in value of the land to be included in the proposed District; (2) there is one lien holder, Comerica Bank, on the property to be included in the proposed District, and the Petitioner has provided the TCEQ with a certificate evidencing its consent to the creation of the proposed District; (3) the proposed District will contain approximately 148.7193 acres located in Fort Bend County, Texas; and (4) the proposed District is within the extraterritorial jurisdiction of the City of Houston, Texas. By Ordinance No. 2006-268, effective March 28, 2006, the City of Houston, Texas, gave its consent to the creation of the proposed District. According to the petition, the Petitioner has conducted a preliminary investigation to determine the cost of the project and from the information available at the time, the cost of the project is estimated to be approximately $11,730,000.

TCEQ Internal Control No. 11222006-D03: Reddy Partnership-Parkaire (Petitioner) filed a petition for creation of Harris County Municipal Utility District No. 482 (District) with the Texas Commission on Environmental Quality (TCEQ). The petition was filed pursuant to Article XVI, Section 59 of the Constitution of the State of Texas; Chapters 49 and 54 of the Texas Water Code; 30 Texas Administrative Code Chapter 293; and the procedural rules of the TCEQ. The petition states the following: (1) the Petitioner is the owner of a majority in value of the land to be included in the proposed District; (2) there are no lien holders on the property to be included in the proposed District, (3) the proposed District will contain approximately 210.94 acres located within Harris County, Texas; and (4) the proposed District is within the extraterritorial jurisdiction of the City of Houston, Texas, and no portion of land within the proposed District is within the corporate limits or extraterritorial jurisdiction of any other city, town or village in Texas. By Ordinance No. 2006-959, effective September 26, 2006, the City of Houston, Texas, gave its consent to the creation of the proposed District. According to the petition, the Petitioner has conducted a preliminary investigation to determine the cost of the project and from the information available at the time, the cost of the project is estimated to be approximately $17,335,000.

INFORMATION SECTION

The TCEQ may grant a contested case hearing on this petition if a written hearing request is filed within 30 days after the newspaper publication of this notice. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any; (2) the name of the Petitioner and the TCEQ Internal Control Number; (3) the statement "I/we request a contested case hearing"; (4) a brief description of how you would be affected by the petition in a way not common to the general public; and (5) the location of your property relative to the proposed District's boundaries. You may also submit your proposed adjustments to the petition. Requests for a contested case hearing must be submitted in writing to the Office of the Chief Clerk at the address provided in the information section below. The Executive Director may approve the petition unless a written request for a contested case hearing is filed within 30 days after the newspaper publication of this notice. If a hearing request is filed, the Executive Director will not approve the petition and will forward the petition and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting. If a contested case hearing is held, it will be a legal proceeding similar to a civil trial in state district court. Written hearing requests should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address. For additional information, individual members of the general public may contact the Districts Review Team, at (512) 239-4691. Si desea información en Español, puede llamar al (512) 239-0200. General information regarding TCEQ can be found at our web site at www.tceq.state.tx.us.

TRD-200606856
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: December 20, 2006

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Notice of Water Quality Applications

The following notices were issued during the period of December 14, 2006 - December 15, 2006.

The following require the applicants to publish notice in a newspaper. Public comments, requests for public meetings, or requests for a contested case hearing may be submitted to the Office of the Chief Clerk, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087, WITHIN 30 DAYS OF THE DATE OF NEWSPAPER PUBLICATION OF THE NOTICE.

AQUA DEVELOPMENT, INC. has applied for a renewal of Texas Pollutant Discharge Elimination System (TPDES) Permit No. 13433-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 500,000 gallons per day. The facility is located approximately 2.2 miles east of the intersection of Farm-to-Market Road 1960 and Windfern Road and approximately 1.8 miles south of the intersection of Farm-to-Market Road 1960 and Farm-to-Market Road 249 in Harris County, Texas

AQUA TEXAS, INC. has applied for a renewal of TPDES Permit No. 13209-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 90,000 gallons per day. The facility is located approximately 4,000 feet southeast of the intersection of U.S. Highway 190 and Farm-to-Market Road 3126 in Polk County, Texas.

AZTEC COVE PROPERTY OWNERS ASSOCIATION, INC. has applied for a renewal of TPDES Permit No. 11831-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 7,500 gallons per day. The facility is located approximately seven miles east of the City of Trinity on the north side of Farm-to-Market Road 356, approximately 2,000 feet west of the bridge over the White Rock Creek Arm of Lake Livingston in Trinity County, Texas.

CONROE BAY CIVIC ASSOCIATION has applied for a renewal of TPDES Permit No. 12582-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 48,000 gallons per day. The facility is located 450 feet north of Lake Conroe and approximately 5 miles northwest of the City of Willis in Montgomery County, Texas.

CITY OF DECATUR has applied for a renewal of TPDES Permit No. WQ0010009001, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 1,200,000 gallons per day. The facility is located approximately 1,300 feet east of Farm-to-Market Road 51, approximately one mile south of the intersection of Farm-to-Market Road 51 and U.S. Highway 81 in Wise County, Texas.

HARRIS COUNTY MUNICIPAL UTILITY DISTRICT NO. 285 has applied for a renewal of TPDES Permit No. 12928-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 600,000 gallons per day. The facility is located approximately 500 feet north of the intersection of Wickhamford Way and Crosshaven Drive, approximately 0.75 mile west of Carpenters Bayou in Harris County, Texas.

LAGUNA MADRE WATER DISTRICT has applied for a major amendment of TPDES Permit No. 10350-001 to recalculate Total Copper limits based on the results of a Water Effects Ratio (WER) Study. The existing permit authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 1,100,000 gallons per day. The facility is located 0.75 mile south and 0.25 mile east of the intersection of Farm-to-Market Road 1792 and State Highway 100 in Cameron County, Texas. The sludge disposal site is located approximately 0.75 mile south and 0.1 mile east of the intersection of Farm-to-Market Road 1792 and State Highway 100 in Cameron County, Texas

MONARCH UTILITIES I L.P a private utility company, has applied to the Texas Commission on Environmental Quality (TCEQ) for a major amendment to Texas Land Application Permit No. WQ0011282001 to authorize an increase in the discharge of treated domestic wastewater from a daily average flow not to exceed 50,000 gallons per day to a daily average flow not to exceed 150,000 gallons per day and to change the method of disposal from irrigation to discharge. The current permit authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 50,000 gallons per day via irrigation of 27 acres of non-public access land. The facility and irrigation site are located east of State Highway 274, adjacent to Cedar Creek Reservoir and approximately seven miles north of the City of Trinidad in Henderson County, Texas.

NORTHWEST HARRIS COUNTY MUNICIPAL UTILITY DISTRICT NO. 29 has applied to the TCEQ for a renewal of TPDES Permit No. 12795-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 565,000 gallons per day. The facility is located 600 feet west of Eldridge Road and 1,500 feet north of U.S. Highway 290 and approximately 4,400 feet southeast of Farm-to-Market Road 1960 in Harris County, Texas.

REDLANDS WATER SUPPLY CORPORATION has applied for a new permit, proposed TPDES Permit No. WQ0014729001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 40,000 gallons per day. The facility will be located 0.25 mile south of Rivercrest Road, approximately 1 mile east of the in-

tersection of Rivercrest Road and U.S. Highway 59 North in Angelina County, Texas.

ROCKY POINT ESTATES LAND TRUST has applied for a renewal of TPDES Permit No. 13732-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 60,000 gallons per day. The facility is located at 4601 Shiloh Road in the Town of Flower Mound in Denton County, Texas.

SCURRY-ROSSER INDEPENDENT SCHOOL DISTRICT has applied for a renewal of TPDES Permit No. 14471-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 40,000 gallons per day. The facility is located approximately 1,700 feet south of the intersection of Farm-to-Market Road 148 and State Highway 34 in Kaufman County, Texas.

SPENCER ROAD PUBLIC UTILITY DISTRICT has applied for a renewal of TPDES Permit No. WQ0011472001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 980,000 gallons per day. The facility is located at 14310 Spencer Road (Farm-to-Market Road 529), approximately 2,000 feet west of the intersection of Jackrabbit Road and Spencer Road, approximately 1.1 miles east of the intersection of State Highway 6 and Spencer Road, adjacent to the east bank of Horsepen Creek in Harris County, Texas.

SPLENDORA INDEPENDENT SCHOOL DISTRICT has applied for a renewal of TPDES Permit No. 11143-002, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 40,000 gallons per day. The facility is located at 23411 Farm-to-Market Road 2090, on the west side of the earthen dam with the concrete spillway, approximately 3 miles northwest of the intersection of Interstate Highway 59 and Farm-to-Market Road 2090 in Montgomery County, Texas.

CITY OF STAR HARBOR has applied to the TCEQ for a renewal of TPDES Permit No. 14268-001, which authorizes the discharge of filter backwash effluent from a water treatment plant at a daily average flow not to exceed 38,000 gallons per day. The facility is located approximately 2.5 miles northwest of the intersection of State Highway 198 and Farm-to-Market Road 3062, just north of the City of Malakoff, and lies on a peninsula of Cedar Creek Reservoir in Henderson County, Texas.

SUNBELT FRESH WATER SUPPLY DISTRICT has applied to the TCEQ for a renewal of TPDES Permit No. 11670-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 990,000 gallons per day. The facility is located approximately 4,000 feet east of the Fairbanks North Houston Road bridge over Whiteoak Bayou in Harris County, Texas.

WARREN INDEPENDENT SCHOOL DISTRICT has applied for a renewal of TPDES Permit No. 11308-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 15,000 gallons per day. The facility is located approximately 0.7 mile southwest of the intersection of U.S. Highway 69 and Farm-to-Market Road 1943 in Tyler County, Texas.

WEST HARRIS COUNTY MUNICIPAL UTILITY DISTRICT NO. 21 has applied for a minor amendment to TCEQ Permit No. 13623-001 to authorize an decrease in the discharge of treated domestic wastewater in the interim phase from a daily average flow not to exceed 0.25 million gallons per day to a daily average flow not to exceed 0.15 million gallons per day. The existing permit also includes a final phase that authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 0.50 million gallons per day. The facility is located approximately 1500 feet south of the Sam Houston Toll Road, east of Windfern Road, west of Fairbanks North Houston Road in Harris County, Texas.

The following do not require publication in a newspaper. Written comments or requests for a public meeting may be submitted to the Office of the Chief Clerk, at the address provided in the INFORMATION SECTION below, WITHIN 30 DAYS OF THE ISSUED DATE OF THE NOTICE.

The TCEQ has initiated a minor amendment of the TPDES permit issued to GEORGE AIVAZIAN to correct a typographical error by revising the monitoring frequency from once per week to once per month. The existing permit authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 1,000 gallons per day. The facility is located at 1910 Highway 6 South in the City of Houston in Harris County, Texas.

INFORMATION SECTION

To view the complete issued notices, view the notices on our web site at www.tceq.state.tx.us/comm_exec/cc/pub_notice.html or call the Office of the Chief Clerk at (512) 239-3300 to obtain a copy of the complete notice. When searching the web site, type in the issued date range shown at the top of this document to obtain search results.

If you need more information about these permit applications or the permitting process, please call the TCEQ Office of Public Assistance, toll-free, at 1-800-687-4040. General information about the TCEQ can be found at our web site at www.tceq.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-200606854
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: December 20, 2006

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Notice of Water Rights Application

Notice issued December 15, 2006.

APPLICATION NO. 12049; The Sabine Mining Company, 6501 Farm Road 968 West, Hallsville, Texas 75650, Applicant, has applied for a Water Use Permit to construct and maintain a dam and reservoir and to divert and use not exceed 206 acre-feet of water per year for mining purposes from the perimeter of the reservoir on Starkey Creek, tributary of the Sabine River, Sabine River Basin, Harrison County, Texas. The application was received on May 18, 2006. Additional information and fees were received on September 5, 2006. The application was accepted for filing and declared administratively complete on October 4, 2006. Written public comments and requests for a public meeting should be submitted to the Office of Chief Clerk, at the address provided in the INFORMATION SECTION below, within 30 days of the date of newspaper publication of the notice.

INFORMATION SECTION

To view the complete issued notices, view the notices on our web site at www.tceq.state.tx.us/comm_exec/cc/pub_notice.html or call the Office of the Chief Clerk at (512) 239-3300 to obtain a copy of the complete notice. When searching the web site, type in the issued date range shown at the top of this document to obtain search results.

A public meeting is intended for the taking of public comment, and is not a contested case hearing.

The Executive Director can consider approval of an application unless a written request for a contested case hearing is filed. To request a contested case hearing, you must submit the following: (1) your name (or

for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any; (2) applicant's name and permit number; (3) the statement "[I/we] request a contested case hearing;" and (4) a brief and specific description of how you would be affected by the application in a way not common to the general public. You may also submit any proposed conditions to the requested application which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the Texas Commission on Environmental Quality (TCEQ), Office of the Chief Clerk at the address provided below.

If a hearing request is filed, the Executive Director will not issue the requested permit and may forward the application and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting.

Written hearing requests, public comments or requests for a public meeting should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address. For additional information, individual members of the general public may contact the Office of Public Assistance at 1-800-687-4040. General information regarding the TCEQ can be found at our web site at www.tceq.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-200606855

LaDonna Castañuela

Chief Clerk

Texas Commission on Environmental Quality

Filed: December 20, 2006

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Department of State Health Services

Annual Republication of the Texas Schedules of Controlled Substances, Including An Amendment Correcting the Names of Two Anabolic Steroids

United States Senate Bill 2195, entitled the "Anabolic Steroid Control Act of 2004" was enacted on October 22, 2004. It went into effect 90 days after enactment, which was January 20, 2005. The bill redefined "anabolic steroid" and included a new list of steroids under the new definition. The list included two typographical errors in the chemical names of two anabolic steroids. The United States Congress corrected these errors under "Section 1180 of the Violence Against Women and Department of Justice Reauthorization Act of 2005" (Pub.L. 109-162). The Deputy Administrator of the Drug Enforcement Agency, therefore, issued a final rule on October 13, 2006 in the *Federal Register*, Volume 71, Number 198 replacing the chemical names for the following anabolic steroids: 13 beta-ethyl-17 beta-hydroxygon-4-en-3-one and stanozolol (17 alpha-methyl-17 beta-hydroxy-[5 alpha]-androst-2-eno[3,2-c]-pyrazole).

Pursuant to the Texas Controlled Substances Act, Health and Safety Code, §481.034(g), as amended by the 75th legislature, at least 31 days have expired since notice of the above referenced action was published, and on December 1, 2006, Charles E. Bell, M.D., Acting Commissioner of the Texas Department of State Health Services, ordered that the substances 13 beta-ethyl-17 beta-hydroxygon-4-en-3-one and stanozolol (17 alpha-methyl-17 beta-hydroxy-[5 alpha]-androst-2-eno[3,2-c]-pyrazole) be amended in Schedule III of the Texas Controlled Substances Act. Schedule III of said Act is hereby amended as shown in the January 2007 republication of the Schedules of Controlled Substances, effective 21 days after publication of this notice.

SCHEDULES OF CONTROLLED SUBSTANCES

PURSUANT TO THE TEXAS CONTROLLED SUBSTANCES ACT, HEALTH AND SAFETY CODE, CHAPTER 481, THESE SCHEDULES, ESTABLISHED JANUARY 1, 2007, SUPERSEDE PREVIOUS SCHEDULES AND CONTAIN THE MOST CURRENT VERSION OF THE SCHEDULES OF ALL CONTROLLED SUBSTANCES FROM THE PREVIOUS SCHEDULES AND MODIFICATIONS.

January 1, 2007

Changes to the schedules are designated by an asterisk (*). Additional information can be obtained by contacting the Department of State Health Services, Drugs and Medical Devices Group, 1100 West 49th Street, Austin, Texas 78756. The telephone number is (512) 834-6755 and the website address is http://www.dshs.state.tx.us/dmd.

SCHEDULES

Nomenclature: Controlled substances listed in these schedules are included by whatever official, common, usual, chemical, or trade name they may be designated.

SCHEDULE I

Schedule I consists of:

Schedule I opiates

The following opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, unless specifically excepted, if the existence of these isomers, esters, ethers, and salts is possible within the specific chemical designation:

(1) Acetyl-alpha-methylfentanyl (N-[1-(1-methyl-2-phenethyl)-4-piperidinyl]-N-phenylacetamide);

(2) Allylprodine;

(3) Alphacetylmethadol (except levo-alphacetylmethadol, also known as levo-alpha-acetylmethadol, levomethadyl acetate, or LAAM);

(4) Alpha-methylfentanyl or any other derivative of Fentanyl;

(5) Alpha-methylthiofentanyl (N-[1-methyl-2-(2-thienyl) ethyl-4-piperidinyl]-N-phenyl-propanamide);

(6) Benzethidine;

(7) Beta-hydroxyfentanyl (N-[1-(2-hydroxy-2-phenethyl)-4-piperidinyl]-N-phenyl-propanamide);

(8) Beta-hydroxy-3-methylfentanyl (N-[1-(2-hydroxy-2-phenethyl)-3-methyl-4-piperidinyl]-N-phenylpropanamide);

(9) Betaprodine;

(10) Clonitazene;

(11) Diampromide;

(12) Diethylthiambutene;

(13) Difenoxin;

(14) Dimenoxadol;

(15) Dimethylthiambutene;

(16) Dioxaphetyl butyrate;

(17) Dipipanone;

(18) Ethylmethylthiambutene;

(19) Etonitazene;

(20) Etoxeridine;

(21) Furethidine;

(22) Hydroxypethidine;

(23) Ketobemidone;

(24) Levophenacylmorphan;

(25) Meprodine;

(26) Methadol;

(27) 3-methylfentanyl (N-[3-methyl-1-(2-phenylethyl)-4-piperidyl]-N-phenylpropanamide), its optical and geometric isomers;

(28) 3-methylthiofentanyl (N-[3-methyl-1-(2-thienyl)ethyl-4-piperidinyl]-N-phenylpropanamide);

(29) Moramide;

(30) Morpheridine;

(31) MPPP (1-methyl-4-phenyl-4-propionoxypiperidine);

(32) Noracymethadol;

(33) Norlevorphanol;

(34) Normethadone;

(35) Norpipanone;

(36) Para-fluorofentanyl (N-(4-fluorophenyl)-N-[1-(2-phenethyl)-4-piperidinyl]-propanamide);

(37) PEPAP (1-(2-phenethyl)-4-phenyl-4-acetoxypiperidine);

(38) Phenadoxone;

(39) Phenampromide;

(40) Phencyclidine;

(41) Phenomorphan;

(42) Phenoperidine;

(43) Piritramide;

(44) Proheptazine;

(45) Properidine;

(46) Propiram;

(47) Thiofentanyl (N-phenyl-N-[1-(2-thienyl)ethyl-4-piperidinyl]-propanamide);

(48) Tilidine; and

(49) Trimeperidine.

Schedule I opium derivatives

The following opium derivatives, their salts, isomers, and salts of isomers, unless specifically excepted, if the existence of these salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Acetorphine;

(2) Acetyldihydrocodeine;

(3) Benzylmorphine;

(4) Codeine methylbromide;

(5) Codeine-N-Oxide;

(6) Cyprenorphine;

(7) Desomorphine;

(8) Dihydromorphine;

(9) Drotebanol;

(10) Etorphine (except hydrochloride salt);

(11) Heroin;

(12) Hydromorphinol;

(13) Methyldesorphine;

(14) Methyldihydromorphine;

(15) Monoacetylmorphine;

(16) Morphine methylbromide;

(17) Morphine methylsulfonate;

(18) Morphine-N-Oxide;

(19) Myrophine;

(20) Nicocodeine;

(21) Nicomorphine;

(22) Normorphine;

(23) Pholcodine; and

(24) Thebacon.

Schedule I hallucinogenic substances

Unless specifically excepted or unless listed in another schedule, a material, compound, mixture, or preparation that contains any quantity of the following hallucinogenic substances or that contains any of the substance's salts, isomers, and salts of isomers if the existence of the salts, isomers, and salts of isomers is possible within the specific chemical designation (for the purposes of this Schedule I hallucinogenic substances section only, the term "isomer" includes optical, position, and geometric isomers):

(1) Alpha-ethyltryptamine (some trade or other names: etryptamine; Monase; alpha ethyl-1H-indole-3-ethanamine; 3-(2-aminobutyl) indole; alpha-ET; AET);

(2) alpha-methyltryptamine (AMT), its isomers, salts, and salts of isomers;

(3) 4-bromo-2,5-dimethoxyamphetamine (some trade or other names: 4-bromo-2,5-dimethoxy-alpha-methylphenethylamine; 4-bromo-2,5-DMA);

(4) 4-bromo-2,5-dimethoxyphenethylamine (some trade or other names: Nexus; 2C-B; 2-(4-bromo-2,5-dimethoxyphenyl)-1-aminoethane; alpha-desmethyl DOB);

(5) 2,5-dimethoxyamphetamine (some trade or other names: 2,5-dimethoxy-alpha-methylphenethylamine; 2,5-DMA);

(6) 2,5-dimethoxy-4-ethylamphetamine (some trade or other names: DOET);

(7) 2,5-dimethoxy-4-(n)-propylthiophenethylamine (2C-T-7), its optical isomers, salts and salts of isomers;

(8) 5-methoxy-N,N-diisopropyltryptamine (5-MeO-DIPT), its isomers, salts, and salts of isomers;

(9) 5-methoxy-3,4-methylenedioxy-amphetamine;

(10) 4-methoxyamphetamine (some trade or other names: 4-methoxy-alpha-methylphenethylamine; paramethoxyamphetamine; PMA);

(11) 1-methyl-4-phenyl-1,2,5,6-tetrahydro-pyridine (MPTP);

(12) 4-methyl-2,5-dimethoxyamphetamine (some trade and other names: 4-methyl-2,5-dimethoxy-alpha-methyl-phenethylamine; "DOM"; and "STP");

(13) 3,4-methylenedioxy-amphetamine;

(14) 3,4-methylenedioxy-methamphetamine (MDMA, MDM);

(15) 3,4-methylenedioxy-N-ethylamphetamine (some trade or other names: N-ethyl-alpha-methyl-3,4(methylenedioxy)phenethylamine; N-ethyl MDA; MDE; MDEA);

(16) 3,4,5-trimethoxy amphetamine;

(17) N-hydroxy-3,4-methylenedioxyamphetamine (Also known as N-hydroxy MDA);

(18) Bufotenine (some trade and other names: 3-(beta-Dimethylaminoethyl)-5-hydroxyindole; 3-(2-dimethylaminoethyl)-5-indolol; N,N-dimethylserotonin; 5-hydroxy-N,N-dimethyltryptamine; mappine);

(19) Diethyltryptamine (some trade and other names: N,N-Diethyltryptamine; DET);

(20) Dimethyltryptamine (some trade and other names: DMT);

(21) Ethylamine Analog of Phencyclidine (some trade or other names: N-ethyl-1-phenylcyclohexylamine; (1-phenylcyclohexyl) ethylamine; N-(1-phenylcyclohexyl)-ethylamine; cyclohexamine; PCE);

(22) Ibogaine (some trade or other names: 7-Ethyl-6,6-beta, 7,8,9,10,12,13-octhydro-2-methoxy-6,9-methano-5H-pyrido[1',2':1,2] azepino [5,4-b] indole; taber-nanthe iboga);

(23) Lysergic acid diethylamide;

(24) Marihuana;

(25) Mescaline;

(26) N-ethyl-3-piperidyl benzilate;

(27) N-methyl-3-piperidyl benzilate;

(28) Parahexyl (some trade or other names: 3-Hexyl-1-hydroxy-7,8,9,10-tetrahydro-6,6,9-trimethyl-6H-dibenzo [b,d] pyran; Synhexyl);

(29) Peyote, unless unharvested and growing in its natural state, meaning all parts of the plant classified botanically as *Lophophora*, whether growing or not, the seeds of the plant, an extract from a part of the plant, and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or extracts;

(30) Psilocybin;

(31) Psilocin;

(32) Pyrrolidine analog of phencyclidine (some trade or other names: 1-(1-phenyl-cyclohexyl)-pyrrolidine, PCPy, PHP);

(33) Tetrahydrocannabinols;

meaning tetrahydrocannabinols naturally contained in a plant of the genus Cannabis (cannabis plant), as well as synthetic equivalents of the substances contained in the cannabis plant, or in the resinous extractives of such plant, and/or synthetic substances, derivatives, and their isomers with similar chemical structure and pharmacological activity to those substances contained in the plant, such as the following:

1 cis or trans tetrahydrocannabinol, and their optical isomers;

6 cis or trans tetrahydrocannabinol, and their optical isomers; and

3,4 cis or trans tetrahydrocannabinol, and its optical isomers.

(Since nomenclature of these substances is not internationally standardized, compounds of these structures, regardless of numerical designation of atomic positions covered);

(34) Thiophene analog of phencyclidine (some trade or other names: 1-[1-(2-thienyl) cyclohexyl] piperidine; 2-thienyl analog of phencyclidine; TPCP); and

(35) 1-[1-(2-thienyl)cyclohexyl]pyrrolidine (some trade or other names: TCPy).

Schedule I stimulants

Unless specifically excepted or unless listed in another schedule, a material, compound, mixture, or preparation that contains any quantity of the following substances having a stimulant effect on the central nervous system, including the substance's salts, isomers, and salts of isomers if the existence of the salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Aminorex (some other names: aminoxaphen; 2-amino-5-phenyl-2-oxazoline; 4,5-dihydro-5-phenyl-2-oxazolamine);

(2) Cathinone (some trade or other names: 2-amino-1-phenyl-1-propanone; alpha-aminopropiophenone; 2-aminopropiophenone and norephedrone);

(3) Fenethylline;

(4) Methcathinone (some other names: 2-(methylamino)-propiophenone; alpha-(methylamino) propiophenone; 2-(methylamino)-1-phenylpropan-1-one; alpha-N-methylaminopropiophenone; monomethylpropion; ephedrone; N-methylcathinone; methylcathinone; AL-464; AL-422; AL-463; and UR1432);

(5) 4-methylaminorex;

(6) N-ethylamphetamine; and

(7) N,N-dimethylamphetamine (some other names: N,N-alpha-trimethylbenzene-ethaneamine; N,N-alpha-trimethylphenethylamine).

Schedule I depressants

Unless specifically excepted or unless listed in another schedule, a material, compound, mixture, or preparation that contains any quantity of the following substances having a depressant effect on the central nervous system, including the substance's salts, isomers, and salts of isomers if the existence of the salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Gamma-hydroxybutyric acid (some other names include GHB; gamma-hydroxybutyrate; 4-hydroxybutyrate; 4-hydroxybutanoic acid; sodium oxybate; sodium oxybutyrate);

(2) Mecloqualone; and

(3) Methaqualone.

SCHEDULE II

Schedule II consists of:

Schedule II substances, vegetable origin or chemical synthesis

The following substances, however produced, except those narcotic drugs listed in other schedules:

(1) Opium and opiate, and a salt, compound, derivative, or preparation of opium or opiate, other than thebaine-derived butorphanol, naloxone and its salts, naltrexone and its salts, and nalmefene and its salts, but including:

(1-1) Codeine;

(1-2) Dihydroetorphine;

(1-3) Ethylmorphine;

(1-4) Etorphine hydrochloride;

(1-5) Granulated opium;

(1-6) Hydrocodone;

(1-7) Hydromorphone;

(1-8) Metopon;

(1-9) Morphine;

(1-10) Opium extracts;

(1-11) Opium fluid extracts;

(1-12) Oxycodone;

(1-13) Oxymorphone;

(1-14) Powdered opium;

(1-15) Raw opium;

(1-16) Thebaine; and

(1-17) Tincture of opium.

(2) A salt, compound, isomer, derivative, or preparation of a substance that is chemically equivalent or identical to a substance described by paragraph (1) of Schedule II substances, vegetable origin or chemical synthesis, other than the isoquinoline alkaloids of opium;

(3) Opium poppy and poppy straw;

(4) Cocaine, including:

(4-1) its salts, its optical, position, and geometric isomers, and the salts of those isomers; and

(4-2) coca leaves and a salt, compound, derivative, or preparation of coca leaves that is chemically equivalent or identical to a substance described by this paragraph, other than decocainized coca leaves or extractions of coca leaves that do not contain cocaine or ecgonine; and

(5) Concentrate of poppy straw, meaning the crude extract of poppy straw in liquid, solid, or powder form that contains the phenanthrene alkaloids of the opium poppy.

Opiates

The following opiates, including their isomers, esters, ethers, salts, and salts of isomers, if the existence of these isomers, esters, ethers, and salts is possible within the specific chemical designation:

(1) Alfentanil;

(2) Alphaprodine;

(3) Anileridine;

(4) Bezitramide;

(5) Carfentanil;

(6) Dextropropoxyphene, bulk (nondosage form);

(7) Dihydrocodeine;

(8) Diphenoxylate;

(9) Fentanyl;

(10) Isomethadone;

(11) Levo-alphacetylmethadol (some trade or other names: levo-alpha-acetylmethadol, levomethadyl acetate, LAAM);

(12) Levomethorphan;

(13) Levorphanol;

(14) Metazocine;

(15) Methadone;

(16) Methadone-Intermediate, 4-cyano-2-dimethylamino-4,4-diphenyl butane;

(17) Moramide-Intermediate, 2-methyl-3-morpholino-1,1-diphenyl-propane-carboxylic acid;

(18) Pethidine (meperidine);

(19) Pethidine-Intermediate-A, 4-cyano-1-methyl-4-phenylpiperidine;

(20) Pethidine-Intermediate-B, ethyl-4-phenylpiperidine-4-carboxylate;

(21) Pethidine-Intermediate-C, 1-methyl-4-phenylpiperidine-4-carboxylic acid;

(22) Phenazocine;

(23) Piminodine;

(24) Racemethorphan;

(25) Racemorphan;

(26) Remifentanil; and

(27) Sufentanil.

Schedule II stimulants

Unless listed in another schedule and except as provided by the Texas Controlled Substances Act, Health and Safety Code, §481.033, a material, compound, mixture, or preparation that contains any quantity of the following substances having a potential for abuse associated with a stimulant effect on the central nervous system:

(1) Amphetamine, its salts, optical isomers, and salts of its optical isomers;

(2) Methamphetamine, including its salts, optical isomers, and salts of optical isomers;

(3) Methylphenidate and its salts; and

(4) Phenmetrazine and its salts.

Schedule II depressants

Unless listed in another schedule, a material, compound, mixture or preparation that contains any quantity of the following substances having a depressant effect on the central nervous system, including the substance's salts, isomers, and salts of isomers if the existence of the salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Amobarbital;

(2) Glutethimide;

(3) Pentobarbital; and

(4) Secobarbital.

Schedule II hallucinogenic substances

(1) Nabilone (Another name for nabilone: (±)-trans-3-(1,1-dimethylheptyl)-6,6a,7,8, 10,10a-hexahydro-1-hydroxy-6,6-dimethyl-9H-dibenzo[b,d]pyran-9-one).

Schedule II precursors

Unless specifically excepted or listed in another schedule, a material, compound, mixture, or preparation that contains any quantity of the following substances:

(1) Immediate precursor to methamphetamine:

(1-1) Phenylacetone and methylamine if possessed together with intent to manufacture methamphetamine;

(2) Immediate precursor to amphetamine and methamphetamine:

(2-1) Phenylacetone (some trade or other names: phenyl-2-propanone; P2P; benzyl methyl ketone; methyl benzyl ketone); and

(3) Immediate precursors to phencyclidine (PCP):

(3-1) 1-phenylcyclohexylamine; and

(3-2) 1-piperidinocyclohexanecarbonitrile (PCC).

SCHEDULE III

Schedule III consists of:

Schedule III depressants

Unless listed in another schedule and except as provided by the Texas Controlled Substances Act, Health and Safety Code, §481.033, a material, compound, mixture, or preparation that contains any quantity of the following substances having a potential for abuse associated with a depressant effect on the central nervous system:

(1) a compound, mixture, or preparation containing amobarbital, secobarbital, pentobarbital, or any of their salts and one or more active medicinal ingredients that are not listed in a schedule;

(2) a suppository dosage form containing amobarbital, secobarbital, pentobarbital, or any of their salts and approved by the Food and Drug Administration for marketing only as a suppository;

(3) a substance that contains any quantity of a derivative of barbituric acid, or any salt of a derivative of barbituric acid, except those substances that are specifically listed in other schedules;

(4) Chlorhexadol;

(5) Any drug product containing gamma hydroxybutyric acid, including its salts, isoners, and salts of isomers, for which an application is approved under §505 of the Federal Food Drug and Cosmetic Act;

(6) Ketamine, its salts, isomers, and salts of isomers. Some other names for ketamine: (±)-2-(2-chlorophenyl)-2-(methylamino)-cyclohexanone;

(7) Lysergic acid;

(8) Lysergic acid amide;

(9) Methyprylon;

(10) Sulfondiethylmethane;

(11) Sulfonethylmethane;

(12) Sulfonmethane; and

(13) Tiletamine and zolazepam or any salt thereof. Some trade or other names for a tiletamine-zolazepam combination product: Telazol. Some trade or other names for tiletamine: 2-(ethylamino)-2-(2-thienyl)-cyclohexanone. Some trade or other names for zolazepam: 4-(2-fluorophenyl)-6,8-dihydro-1,3,8-trimethyl-pyrazolo-[3,4-e][1,4]-diazepin-7(1H)-one, flupyrazapon.

Nalorphine

Schedule III narcotics

Unless specifically excepted or unless listed in another schedule:

(1) a material, compound, mixture, or preparation containing limited quantities of any of the following narcotic drugs, or any of their salts:

(1-1) not more than 1.8 grams of codeine, or any of its salts, per 100 milliliters or not more than 90 milligrams per dosage unit, with an equal or greater quantity of an isoquinoline alkaloid of opium;

(1-2) not more than 1.8 grams of codeine, or any of its salts, per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

(1-3) not more than 300 milligrams of dihydrocodeinone (hydrocodone), or any of its salts, per 100 milliliters or not more than 15 milligrams per dosage unit, with a fourfold or greater quantity of an isoquinoline alkaloid of opium;

(1-4) not more than 300 milligrams of dihydrocodeinone (hydrocodone), or any of its salts, per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

(1-5) not more than 1.8 grams of dihydrocodeine, or any of its salts, per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

(1-6) not more than 300 milligrams of ethylmorphine, or any of its salts, per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active, non-narcotic ingredients in recognized therapeutic amounts;

(1-7) not more than 500 milligrams of opium per 100 milliliters or per 100 grams, or not more than 25 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts; and

(1-8) not more than 50 milligrams of morphine, or any of its salts, per 100 milliliters or per 100 grams with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(2) any material, compound, mixture, or preparation containing any of the following narcotic drugs or their salts:

(2-1) Buprenorphine.

Schedule III stimulants

Unless listed in another schedule, a material, compound, mixture or preparation that contains any quantity of the following substances having a stimulant effect on the central nervous system, including the substance's salts, optical, position, or geometric isomers, and salts of the substance's isomers, if the existence of the salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Benzphetamine;

(2) Chlorphentermine;

(3) Clortermine; and

(4) Phendimetrazine.

Schedule III anabolic steroids and hormones

Anabolic steroids, including any drug or hormonal substance, chemically and pharmacologically related to testosterone (other than estrogens, progestins, corticosteroids, and dehydroepiandrosterone), and include the following:

(1) androstanediol

(1-1) 3 beta,17 beta-dihydroxy-5 alpha-androstane;

(1-2) 3 alpha,17 beta -dihydroxy-5 alpha-androstane;

(2) androstanedione (5 alpha-androstan-3,17-dione);

(3) androstenediol--

(3-1) 1-androstenediol (3 beta,17 beta-dihydroxy-5 alpha-androst-1-ene);

(3-2) 1-androstenediol (3 alpha,17 beta-dihydroxy-5 alpha-androst-1-ene);

(3-3) 4-androstenediol (3 beta,17 beta-dihydroxy-androst-4-ene);

(3-4) 5-androstenediol (3 beta,17 beta-dihydroxy-androst-5-ene);

(4) androstenedione--

(4-1) 1-androstenedione ([5 alpha]-androst-1-en-3,17-dione);

(4-2) 4-androstenedione (androst-4-en-3,17-dione);

(4-3) 5-androstenedione (androst-5-en-3,17-dione);

(5) bolasterone (7 alpha,17 alpha-dimethyl-17 beta-hydroxyandrost-4-en-3-one);

(6) boldenone (17 beta-hydroxyandrost-1,4,-diene-3-one);

(7) calusterone (7 beta,17 alpha-dimethyl-17 beta-hydroxyandrost-4-en-3-one);

(8) clostebol (4-chloro-17 beta-hydroxyandrost-4-en-3-one);

(9) dehydrochloromethyltestosterone (4-chloro-17 beta-hydroxy-17alpha-methyl-androst-1,4-dien-3-one);

(10) delta-1-dihydrotestosterone (a.k.a. '1-testosterone') (17 beta-hydroxy-5 alpha-androst-1-en-3-one);

(11) 4-dihydrotestosterone (17 beta-hydroxy-androstan-3-one);

(12) drostanolone (17 beta-hydroxy-2 alpha-methyl-5 alpha-androstan-3-one);

(13) ethylestrenol (17 alpha-ethyl-17 beta-hydroxyestr-4-ene);

(14) fluoxymesterone (9-fluoro-17 alpha-methyl-11 beta,17 beta-dihydroxyandrost-4-en-3-one);

(15) formebolone (2-formyl-17 alpha-methyl-11 alpha,17 beta-dihydroxyandrost-1,4-dien-3-one);

(16) furazabol (17 alpha-methyl-17 beta-hydroxyandrostano[2,3-c]-furazan);

*(17) 13 beta-ethyl-17 beta-hydroxygon-4-en-3-one;

(18) 4-hydroxytestosterone (4,17 beta-dihydroxy-androst-4-en-3-one);

(19) 4-hydroxy-19-nortestosterone (4,17 beta-dihydroxy-estr-4-en-3-one);

(20) mestanolone (17 alpha-methyl-17 beta-hydroxy-5 alpha-androstan-3-one);

(21) mesterolone (1 alpha-methyl-17 beta-hydroxy-[5 alpha]-androstan-3-one);

(22) methandienone (17 alpha-methyl-17 beta-hydroxyandrost-1,4-dien-3-one);

(23) methandriol (17 alpha-methyl-3 beta,17 beta-dihydroxyandrost-5-ene);

(24) methenolone (1-methyl-17 beta-hydroxy-5 alpha-androst-1-en-3-one);

(25) 17 alpha-methyl-3 beta, 17 beta-dihydroxy-5 alpha-androstane;

(26) 17 alpha-methyl-3 alpha,17 beta-dihydroxy-5 alpha-androstane;

(27) 17 alpha-methyl-3 beta,17 beta-dihydroxyandrost-4-ene;

(28) 17 alpha-methyl-4-hydroxynandrolone (17 alpha-methyl-4-hydroxy-17 beta-hydroxyestr-4-en-3-one);

(29) methyldienolone (17 alpha-methyl-17 beta-hydroxyestra-4,9(10)-dien-3-one);

(30) methyltrienolone (17 alpha-methyl-17 beta-hydroxyestra-4,9-11-trien-3-one);

(31) methyltestosterone (17 alpha-methyl-17 beta-hydroxyandrost-4-en-3-one);

(32) mibolerone (7 alpha,17 alpha-dimethyl-17 beta-hydroxyestr-4-en-3-one);

(33) 17 alpha-methyl-delta-1-dihydrotestosterone (17 beta-hydroxy-17 alpha-methyl-5 alpha-androst-1-en-3-one) (a.k.a. '7-alpha-methyl-1-testosterone');

(34) nandrolone (17 beta-hydroxyestr-4-en-3-one);

(35) norandrostenediol--

(35-1) 19-nor-4-androstenediol (3 beta, 17 beta-dihydroxyestr-4-ene);

(35-2) 19-nor-4-androstenediol (3 alpha, 17 beta-dihydroxyestr-4-ene);

(35-3) 19-nor-5-androstenediol (3 beta, 17 beta-dihydroxyestr-5-ene);

(35-4) 19-nor-5-androstenediol (3 alpha, 17 beta-dihydroxyestr-5-ene);

(36) norandrostenedione--

(36-1) 19-nor-4-androstenedione (estr-4-en-3,17-dione);

(36.2) 19-nor-5-androstenedione (estr-5-en-3,17-dione);

(37) norbolethone (13 beta,17alpha-diethyl-17 beta-hydroxygon-4-en-3-one);

(38) norclostebol (4-chloro-17 beta-hydroxyestr-4-en-3-one);

(39) norethandrolone (17 alpha-ethyl-17 beta-hydroxyestr-4-en-3-one);

(40) normethandrolone (17 alpha-methyl-17 beta-hydroxyestr-4-en-3-one);

(41) oxandrolone (17 alpha-methyl-17 beta-hydroxy-2-oxa-[5 alpha]-androstan-3-one);

(42) oxymesterone (17 alpha-methyl-4,17 beta-dihydroxyandrost-4-en-3-one);

(43) oxymetholone (17 alpha-methyl-2-hydroxymethylene-17 beta-hydroxy-[5 alpha]-androstan-3-one);

*(44) stanozolol (17 alpha-methyl-17 beta-hydroxy-[5 alpha]-androst-2-eno[3,2-c]-pyrazole);

(45) stenbolone (17 beta-hydroxy-2-methyl-[5 alpha]-androst-1-en-3-one);

(46) testolactone (13-hydroxy-3-oxo-13,17-secoandrosta-1,4-dien-17-oic acid lactone);

(47) testosterone (17 beta-hydroxyandrost-4-en-3-one);

(48) tetrahydrogestrinone (13 beta,17 alpha-diethyl-17 beta-hydroxygon-4,9,11-trien-3-one);

(49) trenbolone (17 beta-hydroxyestr-4,9,11-trien-3-one); and

(50) any salt, ester, or ether of a drug or substance described in this paragraph.

Schedule III hallucinogenic substances

(1) Dronabinol (synthetic) in sesame oil and encapsulated in a soft gelatin capsule in U.S. Food and Drug Administration approved drug product. (Some other names for dronabinol:(6aR-trans)-6a,7,8,10a-tetrahydro-6,6,9-tri-methyl-3-pentyl-6H-dibenzo[b,d]pyran-1-ol, or (-)-delta-9-(trans)-tetrahydrocannabinol).

SCHEDULE IV

Schedule IV consists of:

Schedule IV depressants

Except as provided by the Texas Controlled Substances Act, Health and Safety Code, §481.033, a material, compound, mixture, or preparation that contains any quantity of the following substances having a potential for abuse associated with a depressant effect on the central nervous system:

(1) Alprazolam;

(2) Barbital;

(3) Bromazepam;

(4) Camazepam;

(5) Chloral betaine;

(6) Chloral hydrate;

(7) Chlordiazepoxide;

(8) Clobazam;

(9) Clonazepam;

(10) Clorazepate;

(11) Clotiazepam;

(12) Cloxazolam;

(13) Delorazepam;

(14) Diazepam;

(15) Dichloralphenazone;

(16) Estazolam;

(17) Ethchlorvynol;

(18) Ethinamate;

(19) Ethyl loflazepate;

(20) Fludiazepam;

(21) Flunitrazepam;

(22) Flurazepam;

(23) Halazepam;

(24) Haloxazolam;

(25) Ketazolam;

(26) Loprazolam;

(27) Lorazepam;

(28) Lormetazepam;

(29) Mebutamate;

(30) Medazepam;

(31) Meprobamate;

(32) Methohexital;

(33) Methylphenobarbital (mephobarbital);

(34) Midazolam;

(35) Nimetazepam;

(36) Nitrazepam;

(37) Nordiazepam;

(38) Oxazepam;

(39) Oxazolam;

(40) Paraldehyde;

(41) Petrichloral;

(42) Phenobarbital;

(43) Pinazepam;

(44) Prazepam;

(45) Quazepam;

(46) Temazepam;

(47) Tetrazepam;

(48) Triazolam;

(49) Zaleplon;

(50) Zolpidem; and

(51) Zopiclone, its salts, isomers, and salts of isomers.

Schedule IV stimulants

Unless listed in another schedule, a material, compound, mixture, or preparation that contains any quantity of the following substances having a stimulant effect on the central nervous system, including the substance's salts, optical, position, or geometric isomers, and salts of those isomers if the existence of the salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Cathine [(+)-norpseudoephedrine];

(2) Diethylpropion;

(3) Fencamfamin;

(4) Fenfluramine;

(5) Fenproporex;

(6) Mazindol;

(7) Mefenorex;

(8) Modafinil;

(9) Pemoline (including organometallic complexes and their chelates);

(10) Phentermine;

(11) Pipradrol;

(12) SPA [(-)-1-dimethylamino-1,2-diphenylethane]; and

(13) Sibutramine.

Schedule IV narcotics

Unless specifically excepted or unless listed in another schedule, a material, compound, mixture, or preparation containing limited quantities of the following narcotic drugs or their salts:

(1) Not more than 1 milligram of difenoxin and not less than 25 micrograms of atropine sulfate per dosage unit; and

(2) Dextropropoxyphene (Alpha-(+)-4-dimethylamino-1,2-diphenyl-3-methyl-2-propionoxybutane).

Schedule IV other substances

Unless specifically excepted or unless listed in another schedule, a material, compound, substance's salts:

(1) Butorphanol, including its optical isomers; and

(2) Pentazocine, its salts, derivatives, compounds, or mixtures.

SCHEDULE V

Schedule V consists of:

Schedule V narcotics containing non-narcotic active medicinal ingredients

A compound, mixture, or preparation containing limited quantities of any of the following narcotic drugs that also contain one or more non-narcotic active medicinal ingredients in sufficient proportion to confer on the compound, mixture or preparation valuable medicinal qualities other than those possessed by the narcotic drug alone:

(1) Not more than 200 milligrams of codeine, or any of its salts, per 100 milliliters or per 100 grams;

(2) Not more than 100 milligrams of dihydrocodeine, or any of its salts, per 100 milliliters or per 100 grams;

(3) Not more than 100 milligrams of ethylmorphine, or any of its salts, per 100 milliliters or per 100 grams;

(4) Not more than 2.5 milligrams of diphenoxylate and not less than 25 micrograms of atropine sulfate per dosage unit;

(5) Not more than 15 milligrams of opium per 29.5729 milliliters or per 28.35 grams; and

(6) Not more than 0.5 milligram of difenoxin and not less than 25 micrograms of atropine sulfate per dosage unit.

Schedule V stimulants

Unless specifically exempted or excluded or unless listed in another schedule, a compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system, including its salts, isomers and salts of isomers:

(1) Pyrovalerone.

Schedule V depressants

Unless specifically exempted or excluded or unless listed in another schedule, any material, compound, mixture, or preparation, which contains any quantity of the following substances having a depressant effect on the central nervous system, including its salts:

(1) Pregabalin [(S)-3-(aminomethyl)-5-methylhexanoic acid].

TRD-200606853
Cathy Campbell
General Counsel
Department of State Health Services
Filed: December 20, 2006

♦ ♦ ♦

Licensing Actions for Radioactive Materials

The Department of State Health Services has taken actions regarding Licenses for the possession and use of radioactive materials listed in the tables. The subheading "Location" indicates the city in which the radioactive material may be possessed and/or used. T location listing "Throughout Texas" indicates that the radioactive material may be used on a temporary basis at job sites throughout state.

NEW LICENSES ISSUED:

Location	Name	License #	City	Amend -ment #	Date of Action
Lubbock	Grace Clinic of Lubbock DBA Grace Clinic	L06040	Lubbock	00	12/08/06

AMENDMENTS TO EXISTING LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Amarillo	Baptist St Anthony's Health System	L01259	Amarillo	85	12/04/06
Austin	Asuragen Inc	L05977	Austin	02	12/14/06
Austin	Austin Heart PA	L04623	Austin	41	12/01/06
Austin	Austin Heart PA	L05580	Austin	15	12/01/06
Austin	Columbia St Davids Healthcare System LP DBA South Austin Hospital	L03273	Austin	70	12/01/06
Austin	Heart Hospital IV LP	L05215	Austin	21	12/01/06
Austin	St Davids Healthcare Partnership LP LLP	L00740	Austin	95	12/06/06
Austin	Texas Cardiovascular Consultants PA	L05246	Austin	26	12/13/06
Channelview	Phoenix Non Destructive Testing Co	L04454	Channelview	49	11/28/06
College Station	College Station Hospital LP DBA College Station Medical Center	L02559	College Station	63	12/14/06
Corinth	Network Cancer Care of Denton DBA Cancer Care Resource	L05348	Corinth	19	12/11/06
Corpus Christi	The Corpus Christi Medical Center Bay Area	L04723	Corpus Christi	43	12/05/06
Dallas	Cardiac associates of Dallas	L05793	Dallas	04	12/01/06
Dallas	Mallinckrodt Inc	L03580	Dallas	55	12/05/06
Dallas	Medical City Dallas Hospital DBA Medical City	L01976	Dallas	166	12/07/06
Dallas	Pet Net Pharmaceuticals Inc	L05193	Dallas	21	12/12/06
Dallas	Pet Net Pharmaceuticals Inc.	L05193	Dallas	22	12/13/06
Dallas	Renaissance Hospital Dallas Inc	L05900	Dallas	03	12/07/06
Deer Park	Akzo Nobel Polymer Chemicals LLC	L04372	Deer Park	12	12/07/06
Del Rio	Del Rio Heart Institute & Diabetes Center	L05950	Dallas	02	12/14/06
Denton	Trace Life Sciences Inc	L05435	Denton	12	12/06/06
El Paso	Cardinal Health	L01999	El Paso	107	12/13/06
El Paso	Pan American General Hospital LLC DBA Southwestern General Hospital	L02338	El Paso	32	12/14/06
El Paso	The University of Texas at El Paso Radiation Safety Office	L00159	El Paso	54	12/05/06
Fort Worth	Baylor All Saints Medical Center	L02212	Fort Worth	75	12/12/06
Fort Worth	Harris Methodist Fort Worth	L01837	Fort Worth	104	12/11/06
Fort Worth	Radiology Associates	L03953	Fort Worth	43	12/01/06
Houston	Digrad Imaging Solutions Inc	L05414	Houston	27	12/11/06
Houston	E+ PET Imaging II LP DBA PET Imaging of Houston	L05620	Houston	05	11/30/06
Houston	Leaf on a Tree LP DBA Houston Town & Country Hospital	L05979	Houston	01	12/11/06
Houston	Nuclear Imaging Services LLC	L05775	Houston	22	12/13/06
Houston	PETNET Houston LLC DBA PETNET Houston LLC	L05542	Houston	10	12/04/06
Houston	TOPS Specialty Hospital LTD DBA Tops Surgical Specialty Hospital	L05441	Houston	08	12/04/06

AMENDMENTS TO EXISTING LICENSES ISSUED (Continued):

Location	Name	License #	City	Amend-ment #	Date of Action
Houston	University of Texas MD Anderson Cancer Center	L00466	Houston	105	12/01/06
Irving	Baylor Medical Center at Irving DBA Irving Healthcare System	L02444	Irving	65	12/13/06
La Grange	Austin Heart La Grange	L05516	La Grange	17	12/01/06
Lubbock	Covenant Health System DBA Joe Arrington Cancer Research and Treatment Center	L06028	Lubbock	03	11/30/06
Marble Falls	Austin Heart PA DBA Austin Heart Clinic Marble Falls	L05505	Marble Falls	15	12/01/06
McAllen	McAllen Hospitals LP DBA McAllen Medical Center	L01713	McAllen	80	12/11/06
Midlothian	Holcim (Texas) LP	L05888	Midlothian	04	12/01/06
Midlothian	Holcim (Texas) LP	L05888	Midlothian	05	12/07/06
Midlothian	TXI Operations LP	L01421	Midlothian	42	12/14/06
Mission	Mission Hospital	L02802	Mission	35	11/30/06
Muenster	Muenster Hospital District DBA Muenster Memorial Hospital	L04887	Muenster	11	12/13/06
Nacogdoches	Stephen F Austin State University	L05191	Nacogdoches	05	12/14/06
Nederland	Murlidhar A Amin Md PA	L05735	Nederland	02	12/01/06
Pampa	American Diagnostic Medical Corp	L06033	Pampa	01	11/29/06
Plano	Presbyterian Hospital of Plano	L04467	Plano	43	12/13/06
Plano	Texas Heart Hospital of the Southwest LLP DBA The Heart Hospital Baylor Plano	L06004	Plano	01	12/04/06
Port Lavaca	Memorial Medical Center in Calhoun County	L04685	Port Lavaca	07	12/13/06
Richardson	Raytheon Company	L04096	Richardson	25	12/11/06
Richardson	Richardson Hospital Authority DBA Richardson Regional Hospital Center	L02336	Richardson	46	12/01/06
Rio Grande City	Advanced Nuclear Imaging Inc	L05467	Rio Grande City	08	12/11/06
Round Rock	Austin Heart PA DBA Austin Heart	L05456	Round Rock	18	12/01/06
San Antonio	Christus Santa Rosa Cancer Center LLP	L00556	San Antonio	44	12/04/06
San Antonio	Medical and Radiation Physics Inc	L01417	San Antonio	24	12/04/06
San Antonio	The University of Texas Health Science Center at San Antonio	L01279	San Antonio	107	12/05/06
San Antonio	VHS San Antonio Partners LP DBA Baptist Health System	L00455	San Antonio	154	12/14/06
San Antonio	VHS San Antonio Partners LP DBA Baptist Health System	L00455	San Antonio	155	12/14/06
San Antonio	VHS San Antonio Partners LP DBA Baptist Health System	L00455	San Antonio	156	12/14/06
San Marcos	Austin Heart PA DBA Austin Heart San Marcos	L05452	San Marcos	21	12/01/06
Seguin	Structural Metals Inc DBA CMC Steel Texas	L02188	Seguin	20	12/12/06
Texarkana	Christus Health Ark-La-Tex DBA Christus Saint Michael Health System	L04805	Texarkana	17	11/30/06
Tyler	East Texas Medical Center	L00977	Tyler	135	12/06/06
Wadsworth	STP Nuclear Operating Company	L04222	Wadsworth	20	12/04/06
Throughout Tx	City of Abilene Housing Authority	L05459	Abilene	04	12/06/06
Throughout Tx	Texas Department of Transportation	L00197	Austin	123	12/07/06
Throughout Tx	Industrial Asphalt Inc	L05453	Austin	06	12/05/06
Throughout Tx	N-Spec Quality Services Inc	L05113	Corpus Christi	26	12/05/06
Throughout Tx	Fargo Consultants Inc	L05300	Dallas	06	12/05/06
Throughout Tx	Integrity Testing & Inspection Inc	L06027	El Paso	01	12/06/06
Throughout Tx	H & H X-Ray Service Inc	L02516	Flint	58	12/04/06

AMENDMENTS TO EXISTING LICENSES ISSUED (Continued):

Location	Name	License #	City	Amend-ment #	Date of Action
Throughout Tx	Probe Technology Services Inc	L05112	Fort Worth	17	12/11/06
Throughout Tx	Sterigenics US Inc	L03851	Fort Worth	35	12/04/06
Throughout Tx	AITEC USA Investments Inc	L05718	Houston	25	12/05/06
Throughout Tx	Halliburton Energy Services Inc	L00442	Houston	111	12/13/06
Throughout Tx	Houston City of Department of Health and Human Services	L00149	Houston	73	12/13/06
Throughout Tx	Petrochem Inspection Services Inc	L04460	Houston	74	12/13/06
Throughout Tx	RTD Services USA LP	L05985	Houston	02	12/14/06
Throughout Tx	Technical Industries Inc	L05705	Houston	02	12/14/06
Throughout Tx	Tracerco/ /Synetix Services A Business Unit of Johnson Matthey Inc	L03096	Houston	61	12/14/06
Throughout Tx	Weavexx Corporation	L05834	Houston	01	12/07/06
Throughout Tx	Arts Inspection and Pipe Service	L04735	Odessa	06	12/05/06
Throughout Tx	Fugro Consultants LP	L04322	Pasadena	85	12/01/06
Throughout Tx	Conam Inspection & Engineering Inc	L05010	Pasadena	117	12/05/06
Throughout Tx	Midwest Inspection Services	L03120	Perryton	96	12/06/06
Throughout Tx	Southwest Research Institute	L00775	San Antonio	76	12/04/06
Throughout Tx	Drash Consulting Engineers Inc	L04724	San Antonio	20	12/11/06
Throughout Tx	Burge-Martinez Consulting Inc	L05907	San Antonio	03	12/01/06
Throughout Tx	TSI Laboratories	L04767	Victoria	08	12/06/06

RENEWAL OF LICENSES ISSUED:

Location	Name	License #	City	Amend -ment #	Date of Action
Amarillo	The Don & Sybil Harrington Cancer Center	L03053	Amarillo	40	12/05/06
Arlington	Metroplex Hematology Oncology Associates DBA Arlington Cancer Center	L03211	Arlington	79	12/06/06
Austin	Texas Commission on Environmental Quality	L01715	Austin	39	12/07/06
Brenham	Trinity Community Medical Center of Brenham	L03419	Brenham	24	12/12/06
Corpus Christi	Christus Health System DBA Christus Spohn Hospital Corpus Christi Memorial	L00265	Corpus Christi	84	12/08/06
Dallas	Southern Methodist University	L00443	Dallas	23	12/05/06
Mesquite	Baylor Medical Center of Garland DBA Baylor Diagnostic Imaging Center Mesquite	L04914	Mesquite	20	11/29/06
San Antonio	Medlab DBA Clinical Laboratory	L04824	San Antonio	10	12/12/06
Texarkana	Wadley Regional Medical Center	L02486	Texarkana	46	12/06/06
Victoria	Invista Sarl	L00386	Victoria	81	12/08/06
Throughout Tx	Terracon Consultants Inc	L05268	Dallas	20	12/07/06
Throughout Tx	Freese and Nichols Inc	L04301	Fort Worth	12	11/29/06
Throughout Tx	Terra Testing Inc	L02464	Lubbock	32	12/04/06

In issuing new licenses, amending and renewing existing licenses, or approving license exemptions, the Department of State Health Services (department), Radiation Safety Licensing Branch, has determined that the applicant has complied with the applicable provisions of Title 25 Texas Administrative Code (TAC) Chapter 289 regarding radiation control. In granting termination of licenses, the department has determined that the licensee has complied with the applicable decommissioning requirements of 25 TAC Chapter 289. In denying the application for a license, license renewal or license amendment, the department has determined that the applicant has not met the applicable requirements of 25 TAC Chapter 289.

This notice affords the opportunity for a hearing on written request of a person affected within 30 days of the date of publication of this notice. A person affected is defined as a person who demonstrates that the person has suffered or will suffer actual injury or economic damage and, if the person is not a local government, is (a) a resident of a county, or a county adjacent to the county, in which radioactive material is or will be located, or (b) doing business or has a legal interest in land in the county or adjacent county. A person affected may request a hearing by writing Richard A. Ratliff, Radiation Program Officer, Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756-3189. For information call (512) 834-6688.

TRD-200606852
Cathy Campbell
General Counsel
Department of State Health Services
Filed: December 20, 2006

♦ ♦ ♦

Public Utility Commission of Texas

Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas (commission) received an application on December 19, 2006, to amend a state-issued certificate of franchise authority (CFA), pursuant to §§66.001- 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Friendship Cable of Texas, Incorporated, doing business as Suddenlink Communications, for an Amendment to a State-Issued Certificate of Franchise Authority, Project Number 33660 before the Public Utility Commission of Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All inquiries should reference Project Number 33660.

TRD-200606883
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 21, 2006

♦ ♦ ♦

Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas (commission) received an application on December 19, 2006, to amend a state-issued certificate of franchise authority (CFA), pursuant to §§66.001- 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Universal Cable Holdings, Incorporated, doing business as Suddenlink Communications, for an Amendment to a State-Issued Certificate of Franchise Authority, Project Number 33661 before the Public Utility Commission of Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All inquiries should reference Project Number 33661.

TRD-200606884
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 21, 2006

♦ ♦ ♦

Notice of Application for Amendment to Service Provider Certificate of Operating Authority

On December 18, 2006, Eschelon Operating Company filed an application with the Public Utility Commission of Texas (commission) to relinquish its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60672. Applicant intends to relinquish its certificate.

The Application: Application of Eschelon Operating Company for Relinquishment of its Service Provider Certificate of Operating Authority, Docket Number 33646.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than January 10, 2007. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 33646.

TRD-200606859
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 20, 2006

♦ ♦ ♦

Notice of Application for Amendment to Service Provider Certificate of Operating Authority

On December 18, 2006, Pac-West Telecomm, Incorporated filed an application with the Public Utility Commission of Texas (commission) to amend its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60740. Applicant intends to reflect a change in ownership/control to Pac-West Acquisition Company, LLC.

The Application: Application of Pac-West Telecomm, Incorporated for an Amendment to its Service Provider Certificate of Operating Authority, Docket Number 33647.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at (888) 782-8477 no later than January 10, 2007. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 33647.

TRD-200606860
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 20, 2006

♦ ♦ ♦

Notice of Application for Amendment to Service Provider Certificate of Operating Authority

On December 18, 2006, iBroadband Networks, Incorporated filed an application with the Public Utility Commission of Texas (commission) to amend its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60239. Applicant intends to reflect a name change and a change in ownership/control.

The Application: Application of iBroadband Networks, Incorporated for an Amendment to its Service Provider Certificate of Operating Authority, Docket Number 33657.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than January 10, 2007. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 33657.

TRD-200606861
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 20, 2006

♦ ♦ ♦

Notice of Commission Staff's Petition for Designation of Competitive Renewable Energy Zones

Notice is given to the public of a petition to be filed with the Public Utility Commission of Texas on January 4, 2007, for Designation of Competitive Renewable Energy Zones.

Docket Style and Number: Commission Staff's Petition for Designation of Competitive Renewable Energy Zones. Docket Number 33672.

The Petition: The commission staff intends to file this petition to initiate a contested case proceeding in order for the commission to designate competitive renewable energy zones. Staff proposes an intervention deadline of February 5, 2007.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas no later than February 5, 2007, by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All comments should reference Docket Number 33672.

TRD-200606886
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 21, 2006

♦ ♦ ♦

Notice of Commission Workshop on Energy Efficiency Rulemaking

Notice is given to the public of a workshop to be held on Wednesday, January 24, 2007, from 9:30 a.m. to 4:00 p.m. in the Commissioners' Hearing Room, Public Utility Commission, 1701 North Congress Avenue, Austin, Texas, for stakeholders interested in an energy efficiency rulemaking. The purpose of this workshop is to provide an opportunity for stakeholders to present their priorities regarding the rulemaking.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All comments should reference Project Number 33487.

TRD-200606887
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 21, 2006

♦ ♦ ♦

Notice of Petition for Waiver of Denial of Request for Additional Resources

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of a petition on December 18, 2006, for waiver of denial by the North American Numbering Plan Administration (NANPA) Pooling Administrator (PA) of Southwestern Bell Telephone, L.P., doing business as AT&T Texas' (AT&T) request for a one thousand-block of consecutive numbers in the 817 area code.

Docket Title and Number: Southwestern Bell Telephone, L.P., dba AT&T Texas Request for Waiver of Denial of Numbering Resources for the Mansfield Rate Center. Docket Number 33653.

The Application: AT&T does not have the numbering resources available in its inventory to satisfy its customers' request for additional numbering resources to accommodate its growth and their 4-digit dialing pattern.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than January 10, 2007. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 33653.

TRD-200606882
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 21, 2006

♦ ♦ ♦

Notice of Petition for Waiver of Denial of Request for Additional Resources

Notice is given to the public of the filing with the Public Utility Commission of Texas of a petition on December 19, 2006, for waiver of denial by the North American Numbering Plan Administration (NANPA) Pooling Administrator (PA) of Southwestern Bell Telephone, L.P., doing business as AT&T Texas' (AT&T) request for a full code of 10,000 numbers in the San Antonio rate center.

Docket Title and Number: Southwestern Bell Telephone, L.P., doing business as AT&T Texas' Request for Waiver of Denial of Numbering Resources - San Antonio Rate Center. Docket Number 33666.

The Application: To meet its business needs, Washington Mutual is requesting a full code of 10,000 DID numbers. However, AT&T does not have a block of 10,000 numbers in its San Antonio rate center inventory to satisfy this customer's request.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than January 10, 2007. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 33666.

TRD-200606885
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 21, 2006

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Texas Department of Transportation

Public Notice - Aviation

Pursuant to Transportation Code, §21.111, and Title 43, Texas Administrative Code, §30.209, the Texas Department of Transportation conducts public hearings to receive comments from interested parties concerning proposed approval of various aviation projects.

For information regarding actions and times for aviation public hearings, please go to the following web site: **http://www.dot.state.tx.us**. Under Citizen, click on Public Hearings, then click on Aviation Division; or, contact Joyce Moulton, Aviation Division, 150 East Riverside, Austin, Texas 78704, (512) 416-4501 or 800-68-PILOT.

TRD-200606873
Bob Jackson
General Counsel
Texas Department of Transportation
Filed: December 21, 2006

♦ ♦ ♦

How to Use the Texas Register

Information Available: The 14 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Transferred Rules- notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 30 (2005) is cited as follows: 30 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "30 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 30 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online through the Internet. The address is: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the Internet. For website subscription information, call the Texas Register at (800) 226-7199.

Texas Administrative Code

The ***Texas Administrative Code (TAC***) is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles and Parts (using Arabic numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac. The following companies also provide complete copies of the TAC: Lexis-Nexis (1-800-356-6548), and West Publishing Company (1-800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15: 1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Table of TAC Titles Affected***. The table is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register*** (January 21, April 15, July 8, and October 7, 2005). If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with one or more ***Texas Register*** page numbers, as shown in the following example.

TITLE 40. SOCIAL SERVICES AND ASSISTANCE
Part I. Texas Department of Human Services
40 TAC §3.704.....950, 1820

The ***Table of TAC Titles Affected*** is cumulative for each volume of the ***Texas Register*** (calendar year).

SALES AND CUSTOMER SUPPORT

Sales - To purchase additional subscriptions or back issues (beginning with Volume 30, Number 36 – Issued September 9, 2005), you may contact LexisNexis Sales at 1-800-223-1940 from 7am to 7pm, Central Time, Monday through Friday.

Note**: Back issues of the ***Texas Register, published before September 9, 2005, must be ordered through the Texas Register Section of the Office of the Secretary of State at (800) 226-7199.

Customer Support - For questions concerning your subscription or account information, you may contact LexisNexis Matthew Bender Customer Support from 7am to 7pm, Central Time, Monday through Friday.

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How to Use the Texas Register

Information Available: The 14 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

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Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

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Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

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Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Transferred Rules- notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 30 (2005) is cited as follows: 30 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "30 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 30 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online through the Internet. The address is: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the Internet. For website subscription information, call the Texas Register at (800) 226-7199.

Texas Administrative Code

The ***Texas Administrative Code (TAC***) is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles and Parts (using Arabic numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac. The following companies also provide complete copies of the TAC: Lexis-Nexis (1-800-356-6548), and West Publishing Company (1-800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15: 1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Table of TAC Titles Affected***. The table is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register*** (January 21, April 15, July 8, and October 7, 2005). If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with one or more ***Texas Register*** page numbers, as shown in the following example.

TITLE 40. SOCIAL SERVICES AND ASSISTANCE
Part I. Texas Department of Human Services
40 TAC §3.704.....950, 1820

The ***Table of TAC Titles Affected*** is cumulative for each volume of the ***Texas Register*** (calendar year).